Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

THE CITY OF NEW YORK and LEE S. SIEGEL,

Petitioners,

vs.

DEVON WALSH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a prosecutor, who submits in support of a building closing order based on nuisance, an affirmation, which merely summarizes the facts contained in the affidavits of the complaining eyewitnesses, and sets forth the governing statutes and legal precedents of complaining eye-witnesses, lose his absolute immunity because the summary was submitted in the form of an affirmation rather than a memorandum of law?

2. Did the prosecutor act reasonably in seeking an order of closing requiring clear and convincing evidence where his witness stated that he was not 100% certain that the entire third floor was used for prostitution, but that the witness believed that it was so used; where the witness subsequently swore in his affidavit that he had no doubt that it was so used; and where there was uncontroverted evidence that the prosecutor diligently sought to ascertain the investigating eyewitness officer's perception of the events in order to establish the requisite trustworthiness to support probable cause?

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OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit to which this petition is directed will not be published in the Federal Reporter, but is printed in the Appendix (A-1-A-7). The Opinion and Order of the United States District Court for the Southern District of New York granting petitioners' motion for summary judgment on qualified immunity grounds is not reported in the Federal Supplement, but is found at 2001 U.S. Dist. LEXIS 764 and printed in the Appendix (A-9-A-33).

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was filed on February 12, 2002.

The Court has jurisdiction to review the order pursuant to *Behrens v. Pelletier*, 516 U.S. 299, 305-306 (1996), *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), and *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985).

FACTUAL BACKGROUND

The New York City Police Department's Manhattan South Vice Enforcement Squad (hereinafter "MSVES") commenced an investigation into prostitution activity at 332 East 22nd Street, New York, New York, in January 1998 (A-167). On January 31, 1998, four persons were arrested for violating Penal Law §230.00 (prostitution) and one person was arrested for violating Penal Law §230.40 (permitting prostitution) of the New York Penal Code. The activity took place on the first and second floor of the premises (A-167). On February 15, 1998, MSVES conducted another sting operation and arrested two persons who were also charged with the aforementioned crimes. Again the activity occurred on the first and second floors of the premises (A-167). On June 10, 1998, after another operation, more arrests were made for prostitution at the same location. This time, however, the activity occurred on all three

floors of the building (A-98-A-99; A-167). Several more arrests were made on all three floors (A-60-A-61). During the period between January 31, 1998 and June 10, 1998, a total of eight arrests were made on the first three floors of the apartment house (A-98).

On June 24, 1998, the officers of the MSVES, pursuant to the City's Nuisance Abatement Law (Administrative Code of the City of New York, §7-710, *et seq.*), brought the matter to the Mayor's Office of Downtown Enforcement[1]. Lee S. Siegel was the attorney assigned to the case (A-84-A-85). He prepared the affidavits for the officers pursuant to the information that he received from them (A-98-A-99). Sgt. Jagdeshwar Jaskaran, who was in apartment 3W on June 10, 1998, at the time of the arrest of an individual engaged in prostitution, informed him that the first three floors of the location, including apartment 3E and 3W, were involved in prostitution activity (A-98-A-99). The Sergeant told Siegel that he believed the two apartments were connected (A-99). In his deposition taken two years after the event, Sgt. Jaskaran, though recalling virtually nothing about the arrest or about his conversation with Siegel, stated that he told Siegel he was not 100 percent certain that the two apartments were connected, but that he believed they were (A-145-A-146). Based upon this information, Siegel drafted the proper documents. There was no evidence that defendant Siegel acted with any malice; nor in fact, has plaintiff alleged that defendants acted maliciously. Sgt. Jaskaran swore in his affidavit regarding the event that he had no doubt that the entire third floor was used for prostitution (A-51).

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[1] The Mayor's Office was established to close illegal establishments such as houses of prostitution, massage parlors, after hours clubs, and gambling houses, *etc.* Its goal under the "Nuisance Abatement Law" is to improve the quality of life and enhance the community environment throughout the city. The use of property in this illegal manner endangers its value and the safety and welfare of the community. (Administrative Code of the City of New York §7-701, *et seq.*)

On June 25, 1998, the City obtained a temporary restraining and closing order prohibiting the use and occupancy of the first three floors of 332 East 22nd Street, New York, New York (A-111). Pursuant to the Court Order, the location was closed and the appropriate legal notices were placed on the premises (A-118-A-121). Once the premises were secured, an inventory was done and the apartments were padlocked to prevent looting and to safeguard the items therein. Notice was placed on the plaintiff's door to call the local precinct (A-124). Once the plaintiff called the police, she regained access to the apartment and the notices were removed from her apartment only (A-126).

When Siegel moved in Supreme Court, New York County, by order to show cause for the temporary restraining order and closing order prohibiting the use and occupancy of the first three floors of 332 East 22nd Street, he submitted the affidavits of three police officers who were personally involved with the arrests on the premises, including Sgt. Jaskaran, who attested that "I have no doubt that the first, second and third floors of 332 East 22nd Street are being operated as a house of prostitution" (A-51). Siegel also presented the court with his own summary of the applicable law and the evidence, with specific reference to the affidavits of the three complaining witnesses (A-167), in an attorney's affirmation (A-161-A-175).

Plaintiff commenced this action pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendment of the United States Constitution, alleging violation of her Fourth Amendment right against unreasonable searches and seizures caused by defendants City and Siegel insofar as "the actions and omissions of the defendants herein were reckless and grossly negligent" (A-32). Specifically, the complaint alleges that the moving papers were recklessly and improperly prepared by defendant Siegel, when he requested relief for the entire third floor, including plaintiff's apartment (A-30-A-31).

PROCEEDINGS BELOW

In granting defendants' summary judgment motion pursuant to Rule 56 of the Federal Rules of Civil Procedure, the District Court held that defendant Siegel was not entitled to absolute immunity from suit because, in submitting his own affirmation, he acted not in the role of advocate, but rather in the role of witness, and was therefore not eligible for absolute immunity, citing *Kalina v. Fletcher*, 522 U.S. 118 (1997). The District Court, however, did find that Siegel could properly assert the defense of qualified immunity for his decision to seek the warrant because a reasonable attorney could have taken the action in dispute (A-18). The District Court considered the statement of Sgt. Jaskaran that he was not 100 percent certain, but believed the apartments were connected; his professions of lack of memory regarding many events, including whether he sketched a map for the prosecutor detailing how he thought the apartments were connected, as the prosecutor testified he did; and the statements by Siegel in his deposition regarding the efforts he made in his conversation with Jaskaran to ascertain whether there was probable cause to seek a restraining order for the entire third floor (A-19-A-20). The District Court concluded that, even "reading [Jaskaran's] deposition most favorably to plaintiff, though, it establishes at most that Sgt. Jaskaran does not have a clear memory of the events of June, 1998, which is insufficient as a matter of law to create a question of material fact requiring a jury's determination. Nothing in that deposition materially contradicts anything stated by Mr. Siegel" (A-20).

The Court of Appeals for the Second Circuit held that defendant Siegel cannot avail himself of either absolute immunity or qualified immunity. In denying absolute immunity, the Court relied upon *Kalina v. Fletcher*, 522 U.S. 118 (1997). Regarding Siegel's qualified immunity defense, the Court of Appeals relied upon Jaskaran's statement that he was not

100 percent certain that the apartments were connected and, because of that fact, Siegel could not have made a "clear and convincing" showing that a public nuisance was being maintained in that apartment. The Court further held that an "attorney who has secured an order of seizure by the submission of his affidavit that inaccurately presents information known to him cannot be entitled to judgment in his favor based on a 'good faith' immunity under *Harlow*, 457 U.S. at 807" (A-6-A-7).

REASONS FOR GRANTING THE PETITION

I. BECAUSE DEFENDANT SIEGEL WAS ACTING AS AN ADVOCATE IN A PROSECUTORIAL ROLE WHEN HE OBTAINED THE CLOSING AND TEMPORARY RESTRAINING ORDER, AND BECAUSE HE WAS MERELY SUMMARIZING THE EVIDENCE CONTAINED IN THE AFFIDAVITS OF THE COMPLAINING WITNESSES AS WELL AS PRESENTING THE APPLICABLE LAW IN HIS AFFIRMATION RATHER THAN ATTESTING TO THE TRUTH OF THE UNDERLYING FACTS, HE SHOULD BE ABSOLUTELY IMMUNE FROM LIABILITY.

A prosecuting attorney, acting within the scope of his duties in initiating and pursuing a criminal prosecution, is entitled to absolute immunity from suit under the Civil Rights Act of 1871 for actions taken in his prosecutorial capacity. *Imbler v. Pachtman*, 424 U.S. 409 (1976). In *Tenney v. Brandhove*, 341 U.S. 367 (1951), where the issue was legislative immunity, this Court addressed the question of whether Title 42 U.S.C. § 1983 (originally the Civil Rights Act of 1871), which created a species of tort liability that on its face admits of no immunities, was intended by the Reconstruction Congress to restrict the availability of immunities which historically, and for reasons of public policy, had been accorded to various public officials. The Court concluded that, regardless of the unworthy

purposes animating the actions of the legislators, immunities "well grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of §1983. 341 U.S. at 376. The *Tenney* Court held that the Civil Rights statute is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.

Imbler v. Pachtman, supra, 424 U.S. 409, specifically addressed the § 1983 liability of a state prosecuting officer in the context of his claim of absolute immunity. Recognizing that public policy considerations supported absolute immunity for acts undertaken in furtherance of the prosecutorial function at common law, the Court found those same policy considerations equally applicable in § 1983 civil rights suits. In opting for absolute immunity over qualified immunity, the Court stated (424 U.S. at 425):

> It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

The *Imbler* Court endorsed the functional approach to prosecutorial immunity used by the Court of Appeals for the Ninth Circuit below in its granting absolute immunity. The Circuit Court, emphasizing that each of the prosecutor's challenged activities was an integral part of the judicial process, chose to immunize the prosecutorial activities rather than the status of prosecutor *per se*. The Court distinguished between activities where the prosecutor functioned as an advocate, for which he received absolute immunity, and those where his responsibilities could be characterized as administrative or

investigative, for which his immunity would be qualified. The Court agreed that prosecutorial acts in the nature of advocacy were absolutely immune, but declined to decide what immunity, if any, attaches to the administrative or investigative roles. 424 U.S. at 430-431. *See also*, *Burns v. Reed*, 500 U.S. 478, 484-486 (1991); *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000), where the Court of Appeals for the Second Circuit recognized the imprecision of these distinctions; *Barbera v. Smith*, 836 F.2d 96, 100-101 (2d Cir. 1987), where the Second Circuit declined to establish bright line tests in this area, and, while recognizing a distinction between a prosecutor's acquiring evidence (not entitled to absolute immunity) and a prosecutor's organizing, evaluating and marshalling that evidence, declined to determine whether the latter was entitled to absolute protection. In a footnote, however, this Court appears to reject an overly narrow definition of the role of advocate (424 U.S., at 431, n.33):

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include ... which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process, and for a trial, may require the obtaining, reviewing, and evaluating evidence.

While this Court has refrained from establishing a bright line demarcation between a prosecutor's advocacy function, to which it accords absolute immunity, and his or her investigative and administrative functions, to which it accords qualified immunity, the Court has provided substantial guidance, more than sufficient to support a grant of absolute immunity for defendant Siegel's seeking the judicial order at issue here. In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court

rejected a police officer's claim of absolute immunity for his application for an arrest warrant by analogy to the absolute immunity which *Imbler*, *supra*, 424, at 430, accorded to prosecutorial functions "intimately associated with the judicial phase of the criminal process." The Court held that the officer's application for a warrant, "while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." 475 U.S. at 342-343.

In *Burns v. Reed*, 500 U.S. 478 (1991), the Court distinguished between two types of prosecutorial conduct, for both of which the Court of Appeals had found absolute immunity, *i.e.*, participating in a probable cause hearing and giving legal advice to the police. While allowing absolute immunity for the prosecutor's presentations at the probable cause hearing, the Court rejected the demand for it in the context of providing legal advice because the prosecutor failed to meet "his burden of showing that the relevant factors justify an extension of absolute immunity" beyond those traditionally permitted by common law. *Id.*, at 496. *See also*, *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

In the most recent pronouncement on this issue, *Kalina v. Fletcher*, 522 U.S. 118 (1997), relied upon both by the District Court and the Court of Appeals in denying defendant Siegel absolute immunity for his prosecutorial actions in obtaining the restraining and closing order, this Court further defined the parameters of the advocacy role of the prosecutor. The prosecutor in *Kalina* was sued under § 1983 for making inaccurate statements of fact in an affidavit she submitted in support of an application for an arrest warrant for burglary in alleged violation of the plaintiff's right to be free from unreasonable seizures. The prosecutor raised absolute immunity as a defense, and both the District Court and the Ninth Circuit Court of Appeals denied her motion for summary judgment based upon the defense. In order to satisfy

Washington state law, which required that an application for an arrest warrant be supported by an affidavit or sworn testimony establishing the grounds for issuing the warrant, the prosecutor chose to submit her own sworn statement in the form of a "Certification for Determination of Probable Cause," which served as the sole sworn basis for the trial court's finding of probable cause and an order that an arrest warrant be issued.

The Court held that, insofar as the prosecutor was acting as a complaining witness, attesting to the truth of the allegations of fact, which allegations constituted the *sole* sworn factual basis for the issuance of the warrant by the court, she was acting not in the capacity of a prosecutor in the role of advocate, but rather as an evidentiary witness. She was, therefore, not eligible for absolute immunity as defined by common law and Supreme Court precedents. The Court noted that it is not common practice in most jurisdictions to have a prosecutor act as the certifying witness and held that, in all other respects, *i.e.*, her drafting of the certification, her determination that there was probable cause, her decision to file charges and her presentation of the information and her motion to the court, she acted as an advocate and was, therefore, absolutely immune from suit. 522 U.S., at 130. It was for her role as the sole guarantor of the truth of the evidence to which she attested and on the basis of which "the trial court found probable cause" (*Id.*, at 121) to issue an arrest warrant, that she was denied immunity from suit. In contrast to the prosecutor in *Kalina*, the prosecutor here did not act as the sole complaining witness, but rather as an advocate presenting the affidavits of three eyewitness accounts of the illegal activity, which affidavits formed the basis for the motion for the temporary injunction and, in fact, supported the court's grant of the order. The fact that he presented his case in the form of an attorney's affirmation is entirely irrelevant to the *Kalina* holding. To do so exalts the form of the presentation over the substance, which was effectively a memorandum of law.

The Supreme Court has held that agency officials and attorneys performing functions similar to prosecutors are analogous to prosecutors and are deserving of similar protection from liability. *Butz v. Economou*, 438 U.S. 478 (1978). The Court stated (*Id.*, at 515):

> The decision to initiate administrative proceedings against an individual or corporation is very much like a prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have a broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. ... The discretion which [ ] officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete.

Defendant Siegel, an attorney for Midtown Enforcement charged with obtaining court orders temporarily restraining illegal activities and closing premises allegedly used for illegal purposes and activities, is clearly within the ambit of duties described in *Butz*.

In the instant case, defendant Siegel acted solely in the role of advocate in moving before the New York Supreme Court for a temporary restraining and closing order. The Administrative Code of the City of New York, § 7-708, provides that the "corporation counsel shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action for a permanent injunction abating a public nuisance...". In performing his prosecutorial responsibilities pursuant to the statute, Siegel interviewed the three undercover officers involved in the three separate police operations at the premises where the arrests for prostitution and related crimes occurred; prepared affidavits for them, accurately reflecting their evidence of these various illegal activities; and submitted them to the Supreme Court, along with his own

affirmation summarizing the evidence contained in the affidavits of the complaining witnesses, the undercover police officers, and setting forth the relevant law of nuisance abatement (A-102-A-118). Because Siegel acted solely in the capacity of prosecutorial advocate in all his actions prior to the enforcement of the court order, he should be entitled to absolute immunity.

II. BECAUSE THE PROSECUTOR ACTED REASONABLY WHEN HE DETERMINED THAT HE HAD CLEAR AND CONVINCING EVIDENCE TO SUPPORT PROBABLE CAUSE FOR A TEMPORARY INJUNCTION AND CLOSING ORDER FOR THE THIRD FLOOR OF THE PREMISES, HE SHOULD HAVE BEEN AFFORDED THE DEFENSE OF QUALIFIED IMMUNITY.

The doctrine of qualified immunity shields public officials from suit and, therefore, from liability for civil damages if they establish either that 1) their conduct did not violate clearly established rights of which a reasonable person would have known or 2) it was objectively reasonable to believe that their acts did not violate clearly established rights. *Anderson v. Creighton*, 483 U.S. 635, 637-41 (1987); *Weg v. Macchiarola*, 995 F.2d 15, 18 (2d Cir. 1993); *Mozzochi v. Borden*, 959 F.2d 1174, 1177 (2d Cir. 1992); *see also Malley v. Briggs*, 475 U.S. 335, 343 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Where reasonably competent officials could disagree as to whether the conduct at issue would violate clearly established rights, the immunity defense is available. *Malley*, 475 at 341; *Cartier v. Lussier*, 955 F. 2d 841, 846 (2d Cir. 1992).

In the most recent revisiting of this issue, this Court highlighted the purpose of qualified immunity and clarified the "reasonableness" requirement of qualified immunity as distinguished from the "reasonableness" component inherent in a constitutional right allegedly violated. *Saucier v. Katz*, 533

U.S. 194 (2001). Saucier involved a claimed Fourth Amendment violation arising from the use of excessive force by a federal officer against the respondent when he was arrested for demonstrating at a public appearance of the Vice President. The Ninth Circuit Court of Appeals held that the law governing excessive force claims was clear at the time of the arrest and that, in a Fourth amendment context, the qualified immunity inquiry is the same as the inquiry made on the merits, since both concern the objective reasonableness of the officer's conduct in light of the circumstances. *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999). Finding fact questions on the issue of reasonableness, the Court held that it was not necessary to reach the matter of qualified immunity and sent the whole matter to the jury. *Id.* at 967.

This Court stated that "[t]his approach cannot be reconciled with *Anderson v. Creighton* ...". 533 U.S., at 200. Citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Hunter v. Bryant*, 502 U.S. 224 (1991), the Court emphasized that qualified immunity is not a defense to liability, but an immunity from suit and its attendant costs in time and money and, therefore, should be determined at the earliest possible stage in litigation. *Id.*, at 201. The Court proceeded to formulate anew the inquiry to be made in determining whether qualified immunity should be granted. First, "do the facts alleged show the officer's conduct violated a constitutional right"? If none is found, the inquiry is ended. Second, assuming a violation exists, was the right clearly established "in light of the specific context of the case, not as a broad general proposition...." *Id.*, at 201.

With regard to the first prong of the inquiry, the Court found that the Ninth Circuit erred by adopting an approach that would require courts to deny summary judgment anytime a material issue of fact remains, thereby undermining the goal of a qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial

claims on summary judgment". citing *Harlow v. Fitzgerald*, 457 U.S., at 818. As the Court stated (*Saucier v. Katz* [533 U.S., at 202]):

> If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. See *Malley v. Briggs*, 475 U.S. 335, 341 [corresponding citation omitted] (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

Regarding the second prong, the Court held that a separate determination on reasonableness for purposes of qualified immunity, distinct from a determination of reasonableness on the merits, must be undertaken by courts on a summary judgment motion. In response to the argument that *Anderson v. Creighton*, which required a separate determination in a probable cause for a warrantless search situation, is distinguishable from *Graham v. O'Connor*, 490 U.S. 386 (1989), involving an excessive force allegation, the Court stated (*Id.*, at 206):

> Graham and Anderson refute the excessive force/ probable cause distinction on which much of respondent's position seems to depend. The deference owed officers facing suits for alleged excessive force is not different in some qualitative respect from the probable cause inquiry in Anderson. Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations, courts will not hold that they have violated the constitution. yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, Anderson still operates to grant officers immunity for reasonable mistakes as to the legality of their *actions*. The same analysis is applicable in excessive force cases, where in addition to the deference officers

receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

In the instant case, defendant Siegel's seeking the closing and restraining order based upon the information provided by the three undercover police who were eyewitnesses and whose information he had no reason to doubt, is analogous to the officer in *Saucier*, whose use of force, while arguably excessive, was reasonable though mistaken. The official is immune if a competent official would have concluded that a warrant should be issued. And even if competent officers would disagree, immunity should nevertheless be recognized. In the case at bar, competent officials could argue whether a court order should have been obtained. *Malley* 475 U.S. at 341. Despite this "argument", however, defendant Siegel should be immune from liability.

Siegel was presented with reliable evidence by Sgt. Jaskaran in regards to a location know for its prostitution activity. At his deposition, Sgt. Jaskaran testified that he informed Siegel that he believed the third floor was *one* apartment (A-145). Siegel, relying on this evidence, made the decision to include apartment 3E in the petition for an Order Restraining Use of and Closure of the location. He drafted the necessary documents which were presented to the Court. A Justice of the Supreme Court reviewed all the documents presented and deemed that a restraining and closing Orders were appropriate in this matter. Only after the Court issued an order did Siegel and the police go to the apartment house and execute the order.

It was improper for the Court of Appeals, in its viewing of the evidence in a light most favorable to the plaintiff, to rely solely upon Sgt. Jaskaran's statement that he told Siegel he was not 100 percent certain that the two apartments were connected. *Saucier v. Katz*, *supra*, 533 U.S., at 201-202, requires the court to make an independent evaluation of the

evidence to determine the issue of immunity in the first instance. As the District Court correctly stated (A-19-A-20):

> As an initial matter, it is uncontroverted that the investigating officer, Sgt. Jaskaran, told Siegel that "the two apartments [on the third floor] were connected." Siegel Dep., at 39. The only question then remaining is whether he did so with sufficient certainty to give Siegel probable cause to include the entire third floor in the proposed order. That is, did Siegel have "reasonably trustworthy information of facts or circumstances" that led him to believe the officer? *Weyant*, 101 F.3d at 852. Siegel states that "I remember asking him the day that he gave me the information, twice," and that the officer made him a diagram that indicated his perception of how the two apartments were connected. *Id.* In his deposition, Siegel recounts that he repeatedly asked Sgt. Jaskaran whether the two apartments were connected, and how it was that the officer believed that to be the case. *See id.* at 39-47. Certainly this level of diligence in ascertaining an investigating officer's perception of events leads to the requisite "reasonable trustworthiness" required to find probable cause. Having obtained this level of assurance, Siegel had more than an "unparticularized suspicion or 'hunch'" that the two apartments were being used as location of prostitution, *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000), and actions stemming from this good faith belief are protected by qualified immunity.
>
> However, plaintiff maintains that Sgt. Jaskaran's deposition in this case calls into doubt the veracity of defendant Siegel's version of the facts. Even reading that deposition most favorably to plaintiff, though, it establishes at most that Sgt. Jaskaran does not have a clear memory of the events of June, 1998, which is insufficient as a matter of law to create a question of material

fact requiring a jury's determination. Nothing in that deposition materially contradicts anything stated by Mr. Siegel.

For example, Sgt. Jaskaran has stated, "When I was in that apartment, I believed that the entire floor was entirely one room." Friedman Decl., Exh. C, at 10. He further stated "I told Mr. Siegel that I wasn't 100 percent sure but I believed the door went into other rooms on the floor." *Id.* at 10-11. Plaintiff makes much of the fact that Siegel remembers Sgt. Jaskaran sketching a map of his perception of the apartments' layout, which defendant is now unable to produce. When asked about whether he created such a map, Sgt. Jaskaran did not deny it, however. He merely professed a lack of memory and replied, "I may have, I don't remember making that." *Id.* at 12. When pressed further by plaintiff's counsel, asked "When you say you don't remember, you don't remember you did, you don't remember you didn't, [or] you just don't remember?" Sgt. Jaskaran replied once again, simply, "I don't remember." *Id.*

Any factual differences between the two accounts are thus marginal, and reading them to the plaintiff's greatest advantage nonetheless reveals no material differences.

This is the level of evaluation of the evidence required by this Court in *Saucier v. Katz*, *supra*, 533 U.S. 194, before submitting the issue to a jury for a determination.

We submit, moreover, that the statement of Sgt. Jaskaran that he was not 100 percent certain, even standing alone, is insufficient to undermine Siegel's immunity defense because 100 percent certainty is not necessary to support probable cause by clear and convincing evidence. "Clear and convincing" evidence is an intermediate standard of proof between "a fair preponderance of the evidence" and "proof beyond a reasonable doubt." See *Addington v. Texas*, 441 U.S. 418,

423-424 (1979). A party bearing such a burden must show that the evidence makes it highly probable that what he claims is what actually occurred.

In sum, defendant Siegel's actions in moving for a temporary injunction and closing order were reasonable and constitutional and, as such, are immune from suit under *Saucier v. Katz* and *Anderson v. Creighton*.

CONCLUSION

This case presents the Court with the opportunity to clarify an area of absolute immunity fraught with procedural pitfalls for prosecutors. It also permits the Court to amplify the instructions of *Saucier v. Katz*, 533 U.S. 194, 202 (2001), regarding the proper analysis to be undertaken where a qualified immunity is raised. We respectfully ask this Court to grant the petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of February, two thousand and two.

UNITED STATES COURT
OF APPEALS
FILED FEB 12 2002
ROSEANN B. MACKECHNIE,
CLERK
SECOND CIRCUIT

PRESENT: Pierre N. Leval
José A. Cabranes
Chester J. Straub
Circuit Judges.

DEVON WALSH,

Plaintiff-Appellant,

v.

No. 01-7204

THE CITY OF NEW YORK AND
LEE S. SIEGEL,

Defendants-Appellees.

APPEARING FOR APPELLANT:

Leon Friedman (Richard Ware Levitt, Law Offices of Richard Ware Levitt, *on the brief*), New York, N.Y.

APPEARING FOR APPELLEES:

Edward F.X. Hart (Leonard Koerner, *on the brief*), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Naomi Reice Buchwald, *District Judge*).

IN CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is **AFFIRMED** in part and **VACATED** in part and **REMANDED**.

Plaintiff Devon Walsh appeals from the grant of summary judgment in favor of the defendants by the United States District Court for the Southern District of New York (Naomi Reice Buchwald, *Judge*). Defendants are the City of New York and Lee S. Siegel, an attorney for the Mayor's Office of Downtown Enforcement. Walsh brought a Fourth Amendment claim under 42 U.S.C. § 1983 against the City and Siegel for the wrongful designation of her apartment as a place of prostitution that resulted in the apartment's seizure under court order.

The City moved for summary judgment under *Monell v. Dept of Soc. Servs.*, 436 U.S. 658, 694-95 (1978), for lack of a showing that the mistaken seizure was attributable to a City policy or practice. The district court granted the motion. Siegel moved for summary judgment on the basis of both absolute immunity, *see Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976), and qualified immunity, *see Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). The district court denied Siegel's motion to the extent

it was founded on absolute immunity but granted it as a matter of qualified immunity. We affirm the judgment entered in favor of the City for the reasons given by the district court, but vacate the judgment dismissing Walsh's claims against Siegel.

The suit arose out of an investigation by the New York City Police Department's Manhattan South Vice Enforcement Squad into the operation of a house of prostitution under the name FOREVER YOURS in a four story building located at 332 East 22nd Street in Manhattan (the "Building").

The first and second floors of the Building are a single duplex apartment. On two separate occasions, officers of the Vice Squad, acting undercover, solicited prostitution in that duplex. The third floor includes two apartments — #3W, which was part of the FOREVER YOURS brothel, and #3E, which was the plaintiff's residence. There is no interconnection between the two apartments. Officer Jagdeshwar Jaskaran of the Vice Squad solicited an act of prostitution in apartment #3W. He knocked on the door of #3W, offered money in exchange for sex to the woman who answered his knock, and promptly arrested her upon her agreement to accept money for sex.

Jaskaran and the other Vice Squad officers then presented the information of their solicitations of prostitution to attorney Siegel for him to prepare an application to the New York State Supreme Court under New York City's Nuisance Abatement Law, NYC Code § 7-707, *et seq.*, for the closing of the FOREVER YOURS house of prostitution.

In interviewing Jaskaran, Siegel learned that the third floor included a second apartment — #3E — in addition to the apartment in which Jaskaran had solicited prostitution. Siegel questioned Jaskaran as to whether apartments #3W and #3E were interconnected, so as to determine whether his application should seek the seizure of the entire third floor or only #3W. Jaskaran said he "believed" the two apartments were connected. Jaskaran told Siegel his reason for that belief. The

evidence as to the reason he gave is conflicting: On Jaskaran's version — the version most favorable to the plaintiff, which we must accept in ruling on defendants' motion for summary judgment — Jaskaran said only that he had seen a door in apartment #3W and "I told Mr. Siegel that I wasn't 100 percent sure but I believed that door went into [the other apartment]."

Armed with this information, Siegel prepared papers to be submitted to the Supreme Court seeking on behalf of the City an order of temporary closure of a public nuisance. The application sought the closure of the entire first, second, and third floors of the Building.

In support of the application, Siegel submitted his own affidavit in which, after "affirm[ing] the truth of the following," he asserted that "[t]he premises which are the subject of this action are located on the first, second and third floors [of the Building]" and that "the subject premises are being operated under the name FOREVER YOURS as a house of prostitution where acts of prostitution are performed." The affidavit asserts, making reference to the attached affidavits of the Vice Squad Officers, that undercover officers "participated in investigations of the subject premises to determine whether prostitution was taking place there," that "[o]n each day, an officer acting in an undercover capacity made an agreement to engage in sexual conduct . . . in exchange for a fee," and that "[t]he facts set forth in the affidavits of the undercover police officers, described above, make it clear that the subject premises are being maintained as an establishment wherein the employees engage in sexual conduct in exchange for a fee."

Siegel's affidavit went on to assert, "Moreover, plaintiffs request closure of only those portions of the building . . . which are occupied by the offending enterprise, FOREVER YOURS. Such an order would, therefore, be tailored to reach only the defendants' totally illegitimate enterprise; no innocent victims would be included within its scope."

The package of papers Siegel prepared in support of his application for the seizure of the entire third floor, as well as the first and second, included affidavits of Jaskaran and the other undercover officers who solicited acts of prostitution, as well as a memorandum of law prepared by Siegel. None of the papers revealed to the court that the third floor had two apartments.

On the basis of that application, the New York Supreme Court, New York County, granted the application ordering temporary seizure of the subject premises, which included the entire third floor. Armed with the court's order, Siegel accompanied officers of the South Vice Squad to the building and proceeded to seize the first and second floor duplex and the two apartments on the third floor. Plaintiff Walsh was not home when the officers arrived. They broke down her front door and broke her bathroom door as well. When Walsh returned to her home at the end of her working day, she found the entrance to her apartment taped up with police papers forbidding entry and declaring it to be a place of prostitution. Later that very night, after the mistake was discovered, Siegel granted Walsh access to her apartment. Several days later, an amending order was prepared which formally removed Walsh's apartment from the closure order.

Discussion

We conclude that the district court erred in granting Siegel's motion for summary judgment. Siegel's entitlement to a temporary order of closure as to apartment #3E depended, under § 7-707, on his making a "clear and convincing" showing that a "public nuisance" was being maintained in that apartment. Based on the version of disputed facts most favorable to the plaintiff, Siegel either knew or should have known, after his interview of Officer Jaskaran, that what Jaskaran told him could not constitute clear and convincing evidence that prostitution was being conducted in apartment #3E. Jaskaran had told Siegel that he had seen a door in apartment #3W and

"wasn't 100 percent sure but . . . believed that door went into [apartment #3E]." As a matter of law, Jaskaran's belief could not satisfy the "clear and convincing" requirement; Siegel had no reason to believe the door did not simply lead into a closet, a bathroom, or another room in #3W.

In these circumstances, Siegel submitted to the court his personal affidavit in which he assured the court that "the subject premises [which included the entire third floor] are being operated . . . as a house of prostitution." His affidavit also undertook to assure the court that the application had been "tailored" to cover "only those portions of the building . . . which are occupied by the offending enterprise, FOREVER YOURS."

Although we are confident that Siegel had no intent to mislead the court, his affidavit was seriously inaccurate in its presentation of the information presented to him relating to plaintiff Walsh's apartment.[1] On reading Siegel's affidavit objectively, the court would not have realized that the seizure order being sought applied to an apartment other than the one in which Jaskaran solicited prostitution. Nor would the inaccurate nature of Siegel's personal affidavit have been cured by a reading of the other supporting papers Siegel submitted because none of them revealed that the third floor included two apartments.

An attorney who has secured an order of seizure by the submission of his affidavit that inaccurately presents the information known to him cannot be entitled to judgment in his favor based on a "good-faith" immunity under *Harlow*, 457 U.S. at 807. The district court therefore should not have granted sum-

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[1] This ruling is necessitated by the requirement that we accept the version of disputed facts most favorable to the plaintiff. If the jury at trial accepts Siegel's version of what Jaskaran told him, Siegel would then be entitled to judgment as a matter of law.

mary judgment in Siegel's favor based on the doctrine of good faith immunity.[2]

Nor was Siegel entitled to summary judgment based on the doctrine of absolute prosecutorial immunity. The Supreme Court made clear in *Kalina v. Fletcher*, 522 U.S. 118, 130-31 (1997) that when a prosecuting attorney undertakes to act not only in that role but also in the further role of a witness, her furnishing of false evidence is not protected by the shield of absolute immunity.

We therefore need not consider whether Siegel would have been entitled to absolute immunity if he had not given the court a personal affidavit, or if his affidavit had not subscribed to inaccurate assertions of fact.

The judgment of the district court is **AFFIRMED** in part, **VACATED** in part, and **REMANDED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
CLERK OF COURT

BY: /s/ Lucille Carr
Lucille Carr, Deputy Clerk

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[2] Our ruling applies only to Siegel's actions in obtaining the order of closure. We agree for the reasons given by the district court that Siegel's actions in enforcing the closure order were protected by qualified immunity.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 764

DEVON WALSH,

Plaintiff,

– against –

THE CITY OF NEW YORK AND LEE S. SIEGEL,

Defendants.

OPINION AND ORDER

99 Civ. 4586 (NRB)

January 24, 2001, Decided
January 31, 2001, Filed

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff Devon Walsh ("plaintiff" or "Walsh") brings this action against the City of New York ("the City") and Lee Siegel ("Siegel") pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff also includes in her complaint several tort claims under the laws of the State of New York, joined under this court's supplemental jurisdiction, *see* 28 U.S.C. § 1367.

The litigation arises out of the undisputedly incorrect designation of plaintiff's apartment as a house of prostitution, and its subsequent invasion and closure by the New York City Police. Now pending is defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56. Defendant Siegel, an attorney with the Mayor's Office for Midtown Enforcement, asserts that all claims against him should be dismissed because he possesses either absolute or qualified immunity from

any civil liability. The City also moves for summary judgment, arguing that the invasion of Walsh's apartment was not dictated by any governmental policy or practice, and thus plaintiff cannot state a claim against the City under *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

For the following reasons, the defendants' motion is granted.

BACKGROUND

A. *Facts*

During the time period relevant to this action, plaintiff Devon Walsh resided at 332 East 22d Street, Apartment 3E, in New York, New York. *See* Complaint ("Compl."), ¶6. The building is a four-story apartment house that consists of one duplex apartment on the first two floors, and two apartments on each of the third and fourth floors.

During the course of early 1998, the building at 332 East 22d Street was the subject of a New York City investigation as a possible house of prostitution. After a series of complaints, the Manhattan South Vice Enforcement Squad ("MVSES") dispatched undercover officers to investigate prostitution activity there in the winter of 1998.

On January 31 and February 15, 1998, undercover officers were directed to that address after responding to magazine advertisements for an establishment called "Forever Yours." *See* Friedman Decl., Exhs. D, E. When they arrived, they conducted a sting operation by offering money in exchange for sex. After reaching agreement with the individuals on the premises as to the proposed transaction, the officers arrested them for prostitution. In both of these instances, the officers were directed to the first-floor duplex apartment.

In June, 1998, a third sting operation occurred. Undercover Sgt. Jagdeshwar Jaskaran replied to another magazine advertisement for "Forever Yours." *See* Friedman Decl., Exh. F, at

¶3. This time, the officer was directed to apartment 3W, one of the two third-floor apartments (the other third floor apartment was occupied by Ms. Walsh). *See id.*, at ¶4. Once again, the officer reached agreement with a woman therein to exchange sex for money, at which point the officer arrested her and her associates.

The Mayor's Office of Midtown Enforcement ("the Office" or "the OME") is a branch of the New York City Mayor's office that is charged with enforcing public nuisance laws and remedying problems related to residents' quality of life. After this third arrest, on June 24, 1998, the MVSES notified the Office of the ongoing prostitution activity at 332 East 22d Street. The OME then sought to close the premises as a house of prostitution, pursuant to its powers under the Nuisance Abatement Law. *See* N.Y.C. Administrative Code, § 7-703(a) (establishing that two or more criminal convictions of persons for acts of prostitution at a location over of the course of one year is sufficient to establish a public nuisance at that site).

Defendant Lee Siegel, an attorney with the Office, was instructed prepare a closing order for the premises. Siegel drafted an Order to Show Cause, *see* Friedman Decl., Exh. H, seeking a court order to close the first three floors and prohibit the "use or occupancy" of these premises by the inhabitants. The order governed the third floor in its entirety, and thus included both plaintiff's apartment as well as that used by the prostitution ring. *See id.* As part of the application for the order, Siegel prepared affidavits for each of the three officers who were involved in the sting operations. *See* Friedman Decl., Exhs D, E, F.

Judge Beverly Cohen of the Supreme Court, New York County, signed a temporary restraining order on June 25, 1998. *See id.* That order authorized the police to command all persons to vacate the premises, to close and lock the three floors of the building, and to make an inventory of the personal property within. That same evening, MVSES police officers and

defendant Siegel went to 332 East 22d Street to enforce the closing order.

Siegel accompanied the officers to the premises and supervised the enforcement of the order. When he reached the third floor, it became apparent that there were two, unconnected apartments on the third floor, and that apartment 3E was occupied by an individual named Devon Walsh. *See* Friedman Decl., Exh. B ("Siegel Dep."), at 70-71. The door to apartment 3E had already been broken down by the police, and Siegel soon ascertained that "the place looked like an apartment that somebody was living in." *Id.* at 66. Siegel stated that after observing the apartment and after a police inventory search, he had "no evidence" that Walsh's apartment was being used for illegal purposes. Nonetheless, Siegel stated that pursuant to Judge Cohen's order he was compelled to seal the apartment and post a notice that it had been closed as a house of prostitution. *Id.* at 71-73. The raid was completed at some time between 10:00 and 11:00 p.m. *See id.* at 74.

Ms. Walsh, who is a professional chef and worked as a private chef for several prominent corporate executives, returned to her apartment building later that evening. She called defendant Siegel, as his telephone number was indicated on the notices posted on the building. Soon after leaving the scene, Siegel received a page that Walsh had called, and shortly thereafter he returned to 332 East 22d Street. There, he met Ms. Walsh and, after some conversation, allowed her to enter her apartment. *See* Siegel Dep., at 75-77. Several days later, an amending order was prepared which removed apartment 3E, Walsh's residence, from the closing order. *See* Friedman Decl., Exh. I. Approximately one year later, this lawsuit was filed.

B. *Summary Judgment Standard*

Now pending is defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56. Summary judgment is properly granted "'if the pleadings, depositions, answers to interroga-

tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.'" *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 57 (2d Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). The Federal Rules of Civil Procedure mandate the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

In reviewing the record, we must assess the evidence "in the light most favorable to the non-movant and . . . draw all reasonable inferences in [its] favor." *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir. 1990). The mere existence, however, of an alleged factual dispute between the parties will not defeat a motion for summary judgment. In order to defeat such a motion, the non-moving party must affirmatively set forth facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248 (internal quotation omitted).

DISCUSSION

A. *Defendant Siegel's Immunity Defenses*

The Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, provides a broad right of action against "every person" acting under the color of state law to deprive any other person of "rights, privileges, or immunities secured by the Constitution and the laws" of the United States. *See Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961). Over time, however, despite the sweep of the language of the statute, the Supreme Court has made clear that § 1983 "was not meant

'to abolish wholesale all common-law immunities.'" *Burns v. Reed*, 500 U.S. 478, 484, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991) (quoting *Pierson v. Ray*, 386 U.S. 547, 554, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967)). Instead, the statute is to be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418, 47 L. Ed. 2d 128, 96 S. Ct. 984 1976. Thus, a private plaintiff's right of action against those acting under the color of state law is limited by judicially-created immunity doctrine.

In *Imbler*, the Supreme Court for the first time addressed the appropriate immunity from suit for state prosecuting officers. In that case, the Court noted that the keystone to any immunity inquiry must be a functional approach that examines the scope of activity that defendant proposes be immunized, and weighs the countervailing public policy considerations. *Id.* at 424-30; *see also Harlow v. Fitzgerald*, 457 U.S. 800, 810, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) ("Our cases have followed a 'functional' approach to immunity law.")

Here, defendant asserts that his conduct is protected by absolute, or in the alternative, qualified immunity. We examine each claim in turn, applying the functional analysis applicable to immunity questions.

1. Absolute Immunity

Only in the rarest circumstances are government officials accorded absolute immunity from suit in tort for their actions:

> The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in their duties. We have been 'quite sparing' in our recognition of absolute immunity, and have refused to extend it any 'further than its justification would warrant.'

See Burns, 500 U.S. at 486-87 (citations omitted). Absolute immunity has been limited to the President of the United States, *see Nixon v. Fitzgerald*, 457 U.S. 731, 73 L. Ed. 2d 349, 102

S. Ct. 2690 (1982), to legislators, *see Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 44 L. Ed. 2d 324, 95 S. Ct. 1813 (1976), to judges, *see Stump v. Sparkman*, 435 U.S. 349, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978), and to some prosecutorial functions, *see Imbler*, 424 U.S. at 424-30. The officer seeking to establish the immunity defense bears the burden of showing the public policy justification for the asserted immunity. *See Harlow*, 457 U.S. at 812.

The scope of absolute immunity for prosecutors has been sharply limited to the prosecutor's role as an advocate within the judicial process.[1] *See Kalina v. Fletcher*, 522 U.S. 118, 125, 139 L. Ed. 2d 471, 118 S. Ct. 502 (1997). The Court has explained that the compelling reason to bestow absolute immunity on some prosecutorial functions is not to protect the prosecutor *per se*, but to ensure the proper functioning of the prosecutorial office and thus the integrity of the judicial and criminal processes. *See Imbler*, 424 U.S. at 424-29. To protect the exercise of professional judgment in selecting and prosecuting cases "independently and effectively," unconstrained by "fear or harassment", *Barrett v. United States*, 798 F.2d

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[1] Defendant Siegel is not a criminal prosecutor; rather, he is a civil enforcement attorney in the Mayor's Office for Midtown Enforcement. However, we assess his proper immunity protection in the context of those cases governing criminal prosecutors because his job is functionally quite similar to that of a prosecutor. As the Supreme Court has noted,

> Agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution.

Butz v. Economou, 438 U.S. 478, 515, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). *See also Barrett v. United States*, 798 F.2d 565, 572-73 (2d Cir. 1986) (holding that attorneys representing the government as both plaintiff and defendant in civil cases are accorded absolute immunity when functioning as courtroom advocate).

565, 571 (2d Cir. N.Y. 1986), those functions associated with being an advocate in court have been accorded absolute immunity. *Kalina*, 522 U.S. at 125-26. To do otherwise would leave the judicial system hamstrung by lawsuits against prosecutors brought by those they prosecute, and would encourage a prosecutor not "to go forward with a close case where an acquittal likely would trigger a suit against him for damages." *Buckley v. Fitzsimmons*, 509 U.S. 259, 270 n.4, 125 L. Ed. 2d 209, 113 S. Ct. 2606 (1993).

Under this framework, the Court has held, for example, that a prosecutor's provision of legal advice to police during a police investigation does not warrant absolute immunity, because it does not fall within the protected role of advocacy in a judicial proceeding. *See Burns*, 500 U.S. at 489-90. Conversely, the *Burns* Court also held that participation in a probable cause hearing to obtain a search warrant was "intimately associated with the judicial phase of the criminal process," *id.* at 492, quoting *Imbler*, 424 U.S. at 430, and therefore was conduct absolutely immune from civil liability.

Mindful of the sparing approach required when facing the assertion of absolute immunity, *see Scotto v. Almenas*, 143 F.3d 105, 110 (2d Cir. 1998), we find that none of Siegel's actions here merit such blanket immunity. His activities on the scene of the closure of 332 East 22d Street are clearly unrelated to the advocacy function, and more closely resemble that of an investigator or detective. As the *Burns* Court noted, "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." 509 U.S. at 273-74 (citations omitted). Thus, in an observation particularly appropriate here, the Court went on to note that "If a prosecutor plans and executes a raid on a suspected weapons cache, he 'has no greater claim to complete immunity than activities of police officers allegedly acting under his direction. *Id.* at 274.

Siegel's actions directing the officers on the evening of June 24, 1998, are thus not properly accorded absolute immunity.

A closer question is presented by Siegel's preparation of police officer affidavits and his own affidavit in support of the order to show cause to close the premises at 332 East 22d Street. This presents the issue recently alluded to in *Zahrey v. Coffey*, 221 F.3d 342, 346-47 (2d Cir. 2000); that is, we are asked to distinguish the often-muddy "line between a prosecutor's advocacy and investigating roles." *Id.* at 347.

Here, our decision regarding Siegel's immunity for his own affidavit is guided by the Supreme Court's most recent decision governing prosecutorial immunity, *Kalina v. Fletcher*, 522 U.S. 118, 139 L. Ed. 2d 471, 118 S. Ct. 502 (1997). In that case, a prosecutor made false statements of fact in a sworn affidavit supporting an application for an arrest warrant. *See id.* at 120-21. The court to which the prosecutor applied subsequently issued the warrant, in error. The prosecutor asserted an absolute immunity defense, but the *Kalina* Court denied it, equating the function of preparing a sworn affidavit to that of a witness, not a prosecutor. *Id.* at 130 ("Testifying about facts is the function of the witness, not of the lawyer.").

Noting that witnesses were exposed to civil liability at common law, *see id.* at 127, n.14, the *Kalina* Court went on to hold that qualified, not absolute, immunity applied to the preparation of the prosecutor's affidavit in support of a search warrant application. The *Kalina* Court held that when "the evidentiary component of an application for an arrest warrant" consists of an "oath or affirmation" by a prosecuting attorney, the "only function that she performs in giving sworn testimony is that of a witness," *id.* at 131, and thus properly receives qualified immunity.

The facts of that case are so similar to those of the instant one that defendant Siegel cannot distinguish his affidavit as an act of advocacy. Thus, any negligent or deliberate falsity

in the preparation of Siegel's own affidavit cannot be afforded absolute immunity.

2. Qualified Immunity

Siegel argues in the alternative that his actions in connection with the seizure of Walsh's apartment deserve qualified immunity as a matter of law. In tort suits against executive officers, qualified immunity "represents the norm." *Harlow*, 457 U.S. at 807. In fact, the qualified or "good faith" immunity defense provides protection "to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). Here, plaintiff has shown no reason why defendant Siegel should not be accorded qualified immunity for his actions.

The qualified immunity standard was most recently reformulated in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), in which the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

a. *Qualified Immunity for Seeking the Closing Order*

In a case such as this one, in which the plaintiff bases a § 1983 suit on a Fourth Amendment violation, qualified immunity is a defense so long as the decision to seek a warrant was "objectively legally reasonable." *Anderson v. Creighton*, 483 U.S. 635, 644, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1986). Because, on the margin, what constitutes a "reasonable" search or seizure for Fourth Amendment purposes is often a complex question that has led to voluminous case law, *see id.* at 644, the proper inquiry here is whether a reasonable attorney would have taken the action that is disputed. *See Weg v. Macchiarola*, 995 F.2d 15, 18 (2d Cir. 1993). "When reasonable offi-

cers could disagree as to whether probable cause exists, the immunity defense is available." *Id.* at 18. At the summary judgment stage, then, for a defendant to secure summary judgment on the ground of qualified immunity, he must show "that no reasonable jury, viewing the evidence in the light most favorable to the plaintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established law." *See Ford v. Moore*, 237 F.3d 156, 2001 U.S. App. LEXIS 169, *14, 2001 WL 13225, at *5 (2d Cir. 2001) (citing *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995)).

The question in this case is thus whether defendant Siegel could reasonably have believed there to be probable cause that the first three floors of 332 East 22d Street were being used as a house of prostitution. Specifically, we must ascertain if probable cause reasonably existed to seize both apartments on the third floor, or merely apartment 3W, where a sting operation took place. Construing the facts most favorably to the plaintiff, we find that Siegel could reasonably have found probable cause on the facts available to him at the time.[2] Our determination has two components: first, that the statements of the investigating officer provided Siegel with probable cause, and second, that no question of material fact arises from this communication.

As an initial matter, it is uncontroverted that the investigating officer, Sgt. Jaskaran, told Siegel that "the two apartments [on the third floor] were connected." Siegel Dep., at 39. The only question then remaining is whether he did so with sufficient certainty to give Siegel probable cause to include the entire third floor in the proposed order. That is, did Siegel have "reasonably trustworthy information of facts or circum-

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[2] In the qualified immunity context, the question of probable cause is a fact issue that may be considered by a jury if the facts underlying its existence are controverted, *see Moore v. Comesanas*, 32 F.3d 670, 673 (2d Cir. 1994), or may be resolved as a matter of law if the material facts are uncontroverted, *see Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996).

stances" that led him to believe the officer? *Weyant*, 101 F.3d at 852. Siegel states that "I remember asking him the day that he gave me the information, twice," and that the officer made him a diagram that indicated his perception of how the two apartments were connected. *Id.* In his deposition, Siegel recounts that he repeatedly asked Sgt. Jaskaran whether the two apartments were connected, and how it was that the officer believed that to be the case. *See id.* at 39-47. Certainly this level of diligence in ascertaining an investigating officer's perception of events leads to the requisite "reasonable trustworthiness" required to find probable cause. Having obtained this level of assurance, Siegel had more than an "unparticularized suspicion or 'hunch'" that the two apartments were being used as location of prostitution, *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000), and actions stemming from this good faith belief are protected by qualified immunity.

However, plaintiff maintains that Sgt. Jaskaran's deposition in this case calls into doubt the veracity of defendant Siegel's version of the facts. Even reading that deposition most favorably to plaintiff, though, it establishes at most that Sgt. Jaskaran does not have a clear memory of the events of June, 1998, which is insufficient as a matter of law to create a question of material fact requiring a jury's determination. Nothing in that deposition materially contradicts anything stated by Mr. Siegel.

For example, Sgt. Jaskaran has stated, "When I was in that apartment, I believed that the entire floor was entirely one room." Friedman Decl., Exh. C, at 10. He further stated "I told Mr. Siegel that I wasn't 100 percent sure but I believed the door went into other rooms on the floor." *Id.* at 10-11. Plaintiff makes much of the fact that Siegel remembers Sgt. Jaskaran sketching a map of his perception of the apartments' layout, which defendant is now unable to produce. When asked about whether he created such a map, Sgt. Jaskaran did not deny it,

however. He merely professed a lack of memory and replied, "I may have, I don't remember making that." *Id.* at 12. When pressed further by plaintiff's counsel, asked "When you say you don't remember, you don't remember you did, you don't remember you didn't, [or] you just don't remember?" Sgt. Jaskaran replied once again, simply, "I don't remember." *Id.*

Any factual differences between the two accounts are thus marginal, and reading them to the plaintiff's greatest advantage nonetheless reveals no material differences. To summarize, the state of the evidence on this point is as follows: there exists one witness, defendant Siegel, whose account of the facts is substantially — but not completely — supported by that of another, Sgt. Jaskaran. However, where Sgt. Jaskaran's memory of the events does not support Siegel's, neither does it contradict it, nor even cast it in doubt. Rather, Sgt. Jaskaran has an absence of memory of some details. Additionally, no other potential evidence exists to corroborate or impeach defendant Siegel's testimony, because the question of his knowledge turns solely on what he was told by Sgt. Jaskaran prior to preparing the affidavit.

Given these facts, we find no material fact question remaining for trial. Plaintiff cites *Weyant v. Okst*, 101 F.3d 845 (2d Cir. 1996), for the proposition that a "district court [is] not entitled, on a motion for summary judgment, to credit their [the police officers'] version of the facts and enter judgment based on its own view that their version was more likely true." *Id.* at 855. That case, like this one, was a § 1983 case based on a Fourth Amendment claim. However, unlike this one, that case implicated two conflicting eyewitness accounts, and thus two versions of the facts supported by credible evidence.

Recognizing that credibility determinations are not the province of this Court at the summary judgment stage, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), we find no material factual question here because the plaintiff's version of the conversation between

Siegel and Sgt. Jaskaran is supported by "mere conjecture or speculation by the party resisting summary judgment," and is thus insufficient to defeat the motion.[3] *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (1985). Sgt. Jaskaran's incomplete memory leads plaintiff to invent an entirely different version of events, supported only by Sgt. Jaskaran's lapsed memory and no other credible evidence. Thus, although "caution should be exercised in granting summary judgment where state of mind is at issue," *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983), the Second Circuit has recognized that "even in such cases, the existence of undisputed facts can provide an adequate basis for rejecting a claim of improper motivation for a defendant's actions." *Quarles*, 758 F.2d at 840.

Sgt. Jaskaran's memory of the details of the apartment more than two years after the events at issue here, were, unsurprisingly, sketchy at best. But based on the fact that he clearly remembers making affirmative representations to Siegel that the apartments were connected, what memory he has supports Siegel's recitation of the facts. It is uncontroverted that Sgt. Jaskaran stated to Mr. Siegel at least once that the two apartments were connected, and that Siegel relied on that information in applying for the temporary restraining order. Although the perspective of hindsight reveals Sgt. Jaskaran's observations to be erroneous, it is not objectively unreasonable that defendant Siegel relied on them, and thereby adduced that there was probable cause to seize the entire third floor of 332 East 22d Street.

---

[3] Plaintiff provides absolutely no evidence that would call Siegel's version of events into question, nor does she even suggest a reason why his uncontroverted testimony might be disbelieved.

b. *Qualified Immunity for Enforcing the Closing Order*

We likewise find Siegel's activity on the evening that the closing order was enforced to be objectively reasonable in light of clearly established law. It was only after the apartment was broken into by the police pursuant to the erroneous judicial order that Siegel realized that plaintiff's apartment was erroneously included in the order. *See* Siegel Dep., at 66, 69-72. Siegel began his inspection on the first floor, and after inspecting the first and second floor apartments to ensure that they had been secured, and ascertaining who had been arrested, Siegel then proceeded to the third floor, where police had already broken into the two apartments pursuant to their court authorization. *See id.* at 65-67.

Once Siegel observed that there was nobody there and that Walsh's apartment was apparently unconnected to the prostitution activity, he instructed the police that nobody else was to enter the apartment. *See id.* at 71. Siegel's decision thereafter to inventory and seal the apartment seems eminently reasonable; the alternative, after the unfortunate incorrect entry, would have been to leave the apartment and its contents unsecured and uninventoried, a result plaintiff would undoubtedly find unappealing lest items be stolen or damaged. Siegel's actions thus mitigated as much as possible the erroneous restraining order.

The only additional step taken by Siegel which does deserve comment was his posting of a closing notice on Ms. Walsh's apartment. *See* Siegel Dep., at 72. Siegel stated at his deposition that he was required to post the sign because he "had to go according to what the [court] order said." *Id.* Although it is arguable that such literal compliance may not have been essential, and as offensive as Ms. Walsh may have found the notice, plaintiff does not state, and we cannot identify, a con-

stitutional wrong resulting from that action.[4] Indeed, the Supreme Court has clearly held that defamatory statements by public officials that result in a "stigma to one's reputation" do not implicate the guarantees of the Fourteenth Amendment and thus cannot sustain a § 1983 action. *Paul v. Davis*, 424 U.S. 693, 700, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976).

Other than posting the closing notice, Siegel took a number of steps to mitigate the error: he listed on the closing notice the necessary information for Ms. Walsh to reach him when she arrived home. When she did so he promptly returned to the scene, obtained the services of a locksmith so that Ms. Walsh might securely occupy her apartment, gave her his pager number in case of any emergency, and instructed local police to observe her building that evening to ensure her safety. *See id.* at 72-77. Considering all the circumstances, we conclude that Siegel's activities at the scene of 332 East 22d Street did not violate plaintiff's constitutional rights.

Given that no clearly established constitutional right is alleged to have been violated, no § 1983 violation can be maintained. It may well be that this activity may have been tortious; plaintiff pleads several state law tort claims including, most relevantly here, negligent infliction of emotional distress.[5]

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[4] Although not relevant to assessing the existence of a constitutional harm, we should note that the posting of the closing notice on Ms. Walsh's door occurred in a third-floor hallway of a building that had been sealed. Moreover, the record reveals that the only individuals who had access to the area were police officers and Mr. Siegel, all of whom knew the notice to be erroneous. Thus, it is not at all clear that Ms. Walsh has suffered reputational damages from its posting, nor that she may sustain a state law claim. Regardless, we exercise our discretion to dismiss those claims.

[5] Plaintiff's complaint reads in relevant part, "Additionally, the actions and omissions of the defendants herein were reckless and grossly negligent, and as such violated Mr. Smith's [sic] rights under the laws of the State of New York, what are invoked under the supplementary jurisdiction of this Court. The acts constitute trespass, invasion of privacy, false imprisonment, de-

However, because her federal claims are barred by qualified immunity, we take no position on the merits of the state law claims. Plaintiffs' § 1983 claim was the sole predicate for federal jurisdiction, and when federal claims are dismissed, retention of state law claims under supplemental jurisdiction is left to the discretion of the trial court. *See* 28 U.S.C. § 1367(c)(3) (1994) ("district courts may decline to exercise supplemental jurisdiction over a claim. . . if. . . (3) the district court has dismissed all claims over which it has original jurisdiction."); *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994); *In re Merrill Lynch Ltd. Partnerships Litig.*, 7 F. Supp. 2d 256, 258 (S.D.N.Y. 1997). We decline to exercise supplemental jurisdiction over plaintiff's New York state law tort claims. Accordingly, plaintiffs' state law claims are dismissed without prejudice.

C. *Municipal Liability under* Monell

The City of New York ("the City"), also named as a defendant in this lawsuit, likewise moves for summary judgment, arguing that it is shielded from liability by the municipal immunity established in *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Because the plaintiff can establish no unconstitutional policy or practice here, the City's motion is granted. As the foregoing discussion indicates, we find no violation of plaintiff's constitutional rights; thus, no *Monell* claim can be sustained.

Under *Monell*, a municipality may be held liable for the wrongful acts of its executive officers only if those actions were conducted pursuant to a municipal "policy or custom." *Id.* at 694. Here, assuming *arguendo* that plaintiff's rights were violated, plaintiff's complaint does not identify an unlawful policy or custom. Walsh appears not to argue that the policy of seeking closure orders after the identification of two

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struction of property, and intentional and negligent infliction of emotional distress." Complaint, at ¶ 14.

events of prostitution at a location within a year is unconstitutional, but instead that Siegel's allegedly unlawful actions expose the City to liability because he a policymaker for the purposes of a *Monell* inquiry. *See* Plaintiff's Br., at 16-17.

However, it is manifest that Siegel is not in fact a policymaker of any kind. Whether a municipal official is a policymaker is "a matter of law to be decided by the court." *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000). Here, the Office of Midtown Enforcement operated pursuant to the Nuisance Abatement Law. *See* Siegel Dep., at 16. Siegel, an attorney out of law school for merely four years, was an Assistant Counsel in that office, reporting to Virginia Sullivan, who in turn reported to the director of the Office. *See id.* at 12-13.

After the police department vice unit identified a nuisance to be abated, they informed the Office of Midtown Enforcement. Ms. Sullivan in turn directed Mr. Siegel to prepare the proposed closing order for these premises. *See id.* at 20. It is apparent that Mr. Siegel made no policymaking decisions whatsoever as to whether to bring the case, and thus his actions cannot expose the City to *Monell* liability.

CONCLUSION

For the foregoing reasons, summary judgment in favor of the defendant is granted. The Clerk of the Court is respectfully directed to close the case.

DATED: New York, New York
January 24, 2001

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVON WALSH,

Plaintiff,

– against –

THE CITY OF NEW YORK AND LEE S. SIEGEL,

Defendants.

CORRECTING MEMORANDUM

99 Civ. 4586 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

On January 31, 2001, this Court issued a decision in the above-captioned case dismissing plaintiff's complaint. That opinion is hereby amended as follows:

On page 24, the words "with prejudice' at lines 4-5 should be replaced with "without prejudice". The opinion remains unchanged in all other respects.

DATED: New York, New York
May 7, 2001

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOC # 14

U. S. DISTRICT COURT
FILED
JAN 31 2001
S.D.N.Y.

DEVON WALSH,

Plaintiff,

– against –

THE CITY OF NEW YORK and LEE S. SIEGEL,

Defendants.

99 **CIVIL** 4586 (NRB)

JUDGMENT

Defendants having moved for summary judgment pursuant to Fed. R. Civ. P. 56, and the matter having come before the Honorable Naomi Reice Buchwald, United States District Judge, and the Court, on January 24, 2001, having rendered its Opinion (85114) and Order granting defendants' motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (85114) and Order dated January 24, 2001, defendants' motion for summary judgment is hereby granted; accordingly, this case is closed.

Dated: New York, New York
January 31, 2001

JAMES M. PARKISON
Clerk of Court

BY: /s/
Deputy Clerk

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THIS DOCUMENT WAS
ENTERED
ON THE DOCKET ON 2/5/01

Leon Friedman (LF #7124)
148 East 78th Street
New York, New York 10021
(212) 737-0400

COPY

Richard Ware Levitt (RL #9177)
148 East 78th Street
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(212) 737-0400

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVON WALSH

Plaintiff,

– against –

THE CITY OF NEW YORK and LEE S. SIEGEL

Defendants.

99 Civ. 4586
(Judge Jones)

FIRST AMENDED COMPLAINT

Plaintiff, by her attorneys, Leon Friedman and Richard Ware Levitt, for her complaint, alleges as follows:

INTRODUCTION

1. This is an action to redress the deprivation by the defendant of rights secured to plaintiff by the Constitution and the laws of the United States and of the State of New York. Defendant City of New York, through improper and neglectful action, wrongfully designated the apartment of plaintiff as one inhabited by prostitutes. As a result of this wrongful designation, plaintiff's apartment was labeled and designated as a place where prostitution was taking place. A court order was obtained allowing police officers to invade plaintiff's apart-

ment. Her apartment was forcibly invaded, her door was broken down and extensive damage was done to her property. A restraining notice prohibited plaintiff from using her own apartment, and she was labeled a prostitute to the entire world. In this suit, she seeks redress.

JURISDICTION

2. This action arises under 42 U.S.C. §1983, and the Fifth and Fourteenth Amendments to the United States Constitution as hereinafter more fully appears. This Court has jurisdiction pursuant 28 U.S.C. §§1331, 1332, 1343, and 1367. Venue is proper in this district under 28 U.S.C. §1391 since the claim arose in the Southern District of New York. The amount in controversy exceeds, exclusive of interest and costs, the sum of $75,000.00.

THE PARTIES

3. Plaintiff Devon Walsh is a resident of the City and State of New York, residing in New York County.

4. Defendant the City of New York is a municipal corporation in New York State.

5. Defendant Lee S. Siegel is an attorney working for the Mayor's Office of Midtown Enforcement.

FACTS

6. Plaintiff is a highly successful administrative assistant to a major corporate executive. She has led an exemplary personal life and has had a successful business life for her entire working career. At the time of the events in question, she lived in apartment 3E at 332 East 22d Street, New York, N.Y.

7. On June 24, 1998, the City of New York with defendant Siegel acting as its attorney, commenced an action to abate a public nuisance on the first, second and third floors at 332 East 22d Street, New York, N.Y. The City claimed that all

the apartments on the first, second and third floors were houses of prostitution.

8. The action was based upon investigations by three undercover police officers. The affidavits of the police undercover agents recited that they had been solicited to pay for sex by prostitutes operating on the first and second floors of 332 East 22d Street and by a prostitute in apartment 3W at that building. There was absolutely no evidence of any kind implicating or involving anyone living in apartment 3E in any act of prostitution. Rather than naming only the first and second floors and apartment 3W in the nuisance action — the only apartments for which any evidence of prostitution existed — the City in its moving papers, recklessly and improperly prepared by defendant Siegel, requested relief for the entire third floor, including plaintiff's apartment at 3E.

9. In fact, plaintiff lived in apartment 3E at 332 East 22d St, and was not a prostitute. There was no evidence of any kind that she was a prostitute or that her apartment was being used as a house of prostitution. Nevertheless defendant Siegel acting on behalf of defendant City, prepared legal papers naming the entire third floor as engaged in prostitution.

10. On June 25, 1998, the City obtained a temporary restraining order and closing order prohibiting the use of the first, second and third floors of 332 East 22d Street, including plaintiff's apartment 3E. Based on this order, the City of New York blocked off the entrance to her building with tape, to which were attached documents stating that the first three floors had been closed because of prostitution. She went up to her apartment and noted that her door had been broken into and a padlock placed on the door, with court documents posted on the door, stating that the apartment had been closed because of prostitution.

11. Extensive damage was done to plaintiff's door by a sledge hammer and the locks on the door were destroyed. The

door was also padlocked so plaintiff could not go into her own apartment. Plaintiff called the local precinct and two police officers came and allowed her access to her apartment so she could feed her cats. When inside, plaintiff discovered that extensive damage had been done to the bathroom door as well.

12. As a result of the invasion of her apartment, the destruction of her personal property as described above and the labeling of her as a prostitute, plaintiff suffered extreme emotional and psychiatric distress and had to seek psychiatric assistance, including medication. She has suffered and continues to suffer adverse psychiatric reactions.

LEGAL CLAIMS

13. The actions and omissions of the defendant City of New York and defendant Siegel violated plaintiff's Fourth Amendment right against unreasonable searches and seizures as secured by the Fourteenth Amendments to the United States Constitution and by Title 42 U.S.C. §§ 1983 and 1988. The actions also violated plaintiff's rights under the New York Constitution, Article 1, Section 12.

14. Additionally, the actions and omissions of the defendants herein were reckless and grossly negligent, and as such violated Mr. Walsh's rights under the laws of the State of New York, which are invoked under the supplementary jurisdiction of this court. The acts constitute trespass, invasion of privacy, false imprisonment, destruction of property and intentional and negligent infliction of emotional distress.

15. As a result of defendants' wrongful conduct, plaintiff endured substantial pain and suffering, the intentional and/or negligent infliction of emotional distress.

15. Plaintiff has filed a timely Notice of Claim against the City of New York.

WHEREFORE, plaintiff demands judgment against the defendant as follows:

A. Compensatory damages in an amount to be determined by the jury;

B. Punitive damages in an amount to be determined by the jury;

C. Attorney fees and costs of this action.

D. Such other relief as this Court shall consider to by fair and equitable.

E. Plaintiff demands a trial by jury.

Dated: June 28, 1999.

/s/ Leon Friedman

Leon Friedman (LF #7124)
148 East 78th Street
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(212) 737-0400

Richard Ware Levitt
(RL #9177)
148 East 78th Street
New York, New York 10021
(212) 737-0400

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVON WALSH,

Plaintiff,

– against –

THE CITY OF NEW YORK and
LEE S. SIEGEL,

Defendants.

ANSWER

99 CIV. 4586 (BSJ)

THE CITY OF NEW YORK and LEE S. SIEGEL, by their attorney, Michael D. Hess, Corporation Counsel of the City of New York, for their answer to the complaint, respectfully allege, upon information and belief, as follows:

1. Deny the allegations set forth in paragraph "1" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

2. Deny the allegations set forth in paragraph "2" of the complaint, except admit that plaintiff purports to proceed as set forth therein.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "3" of the complaint.

4. Admit the allegations set forth in paragraph "4" of the complaint.

5. Deny the allegations set forth in paragraph "5" of the complaint, except admit that at the time alleged in the complaint defendant Siegel was an Assistant Counsel in the Mayor's Office of Midtown Enforcement.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "6" of the complaint.

7. Deny the allegations set forth in paragraph "7" of the complaint, except admit that the City of New York commenced an action to abate a public nuisance at 332 East 22nd Street, New York, New York was commenced in or about June, 1998.

8. Deny the allegations set forth in paragraph "8" of the complaint, except admit that three undercover police agents submitted affidavits with the City's moving papers, and respectfully refer the Court to the affidavits and the City's moving papers for a statement of their contents.

9. Deny knowledge or information sufficient to form a belief as to the allegations set forth in the first sentence of paragraph "9" of the complaint, and deny the remaining allegations in paragraph "9".

10. Deny knowledge or information sufficient to form a belief as to the allegations set forth in paragraph "10" of the complaint, except admit that in June, 1998, the City obtained a temporary restraining order prohibiting the use of 332 East 22nd Street, New York, New York.

-11. Deny knowledge or information sufficient to form a belief as to the allegations set forth in paragraph "11 " of the complaint.

12. Deny the allegations set forth in paragraph "12" of the complaint.

13. Deny the allegations set forth in paragraph "13" of the complaint.

14. Deny the allegations set forth in paragraph "14" of the complaint.

15. Deny the allegations set forth in paragraph "15" of the complaint.

16. Deny the allegations set forth in the second paragraph "15" of the complaint, except admit that a Notice of Claim was received by the Comptroller's Office in or about September, 1998.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

17. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

18. Defendants have not violated any rights, privileges or immunities under the Constitution or laws of the United States or the State of New York or any political subdivision thereof.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

19. The individual defendant has not violated any clearly established constitutional or statutory right of which a reasonable person would have known and therefore is protected by qualified immunity.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

20. At all times relevant to the acts alleged in the complaint, defendants acted reasonably in the proper and lawful exercise of their discretion.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

21. Any injury alleged to have been sustained resulted from plaintiff's own culpable or negligent conduct and was not the proximate result of any act of the defendants.

WHEREFORE, defendants request judgment dismissing the complaint in its entirety, together with the costs and disbursements of this action, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 26, 1999

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Room 2-155
New York, New York 10007
(212) 788-0867

By: /s/ Vivian Dole
Vivian Dole (VD-7752)
Assistant Corporation Counsel

TO: LEON FRIEDMAN, ESQ.
RICHARD WARE LEVITT, ESQ.
Attorneys for Plaintiff
148 East 78th Street
New York, New York 10021
(212) 737-0400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVON WALSH,

Plaintiff,

– against –

THE CITY OF NEW YORK, and LEE S. SIEGEL

Defendants.

NOTICE OF MOTION

99CIV4586 (NRB)

PLEASE TAKE NOTICE that upon the annexed Declaration of Catherine Mirabile, dated June 9, 1999, and the exhibits annexed thereto, the accompanying Memorandum of Law, and upon all the papers and proceedings had herein, the defendants City of New York and Lee S. Siegel will move this Court, before the Honorable Naomi Reice Buchwald, at the United States Courthouse for the Southern District of New York located at 500 Pearl Street, New York, New York, 10007, in Courtroom 2270 on the 3 day of August, 2000 at 9:30 a.m. of that day, or as soon thereafter as counsel may be heard, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment dismissing the complaint as against all defendants, together with such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any must be served on the undersigned on or before June 23, 2000, and reply papers, if any shall be served on or before July 10, 2000.

Dated: New York, New York
June 9, 2000

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Room 2-155
New York, New York 10007
(212) 788-1276

By: /s/ Catherine Mirabile
Catherine Mirabile (CM 1290)
Assistant Corporation Counsel

TO: Leon Friedman, Esq. And Richard Ware Levitt
Attorney for Plaintiff
148 East 78th Street
New York, New York 10021
(212) 737-0400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVON WALSH,

Plaintiff,

– against –

THE CITY OF NEW YORK,
LEE S. SIEGEL

Defendants.

DECLARATION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

99CIV4586 (NRB)

CATHERINE MIRABILE, declares pursuant to 28 U.S.C. § 1746, under penalty of perjury, as follows:

1. I am an Assistant Corporation Counsel in the office of MICHAEL D. HESS, Corporation Counsel of the City of New York, attorney for defendants, the City of New York and Lee Siegel. I submit this declaration in support of defendants' motion. I am familiar with the facts and circumstances stated herein based upon personal knowledge, the books and records of the City of New York, and conversations with its agents and employees, and submit this declaration in support of defendants' motion for summary judgement pursuant to Rule 56 of the Federal Rules of Civil Procedure.

2. I also submit this declaration to place the relevant documents on the record in support of the defendants' motion for summary judgement in the above captioned matter.

3. Attached as exhibit "A" is a copy of the Summons and Complaint in the instant action.

4. Attached as exhibit "B" are excerpts form the Deposition of Lee S. Siegel.

5. Attached as exhibit "C" is the affidavit of Police Officer Shield No. 28564.

6. Attached as exhibit "D" is the affidavit of Police Officer Shield No. 2671.

7. Attached as exhibit "E" is the affidavit of Police Officer Shield No. 3512.

8. For the reasons set forth above and in the accompanying memorandum of law, defendants respectfully requests that the Court grant defendants' motion.

Dated: New York, New York
June 9, 2000

/s/ Catherine Mirabile
Catherine Mirabile (CM 1290)
Assistant Corporation Counsel

**Exhibit A to Mirabile Declaration -
Summons and First Amended Complaint
(First Amended Complaint reproduced herein
at pp. A-29–A-33)**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 99XF005274

SUMMONS IN A CIVIL ACTION

DEVON WALSH

V.

THE CITY OF NEW YORK
& LEE SIEGEL

CASE NUMBER:

99 CIV 4586
(Judge Jones)

TO:

THE CITY OF NEW YORK
Municipal Bldg
1 Centre Street
New York, NY

&

LEE SIEGEL
Mayor's Office
330 West 42nd Street
New York, New York 10036

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Leon Friedman
148 East 78th Street
New York, NY 10021
212-737-0400

an answer to the complaint which is herewith served upon you, within 20 days days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ James Parkison
CLERK

/s/
BY DEPUTY CLERK

June 25, 1999
DATE

Exhibit C to Mirabile Declaration -
Affidavit of Undercover Police Officer
Shield No. 28564

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE CITY OF NEW YORK, et al.,

Plaintiffs, AFFIDAVIT

– against –

Index No.

EVADNE BAKER (A/K/A/ EVADNE AUCHAMBAULT), *et al.*,

Defendants.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

UNDERCOVER POLICE OFFICER, SHIELD NO. 28564, being duly sworn, deposes and says:

1. I am a Police Officer with the New York City Police Department. I am assigned to the Manhattan South Vice Enforcement Squad (hereinafter "MSVES"), where my duties included the enforcement of laws concerning prostitution and related activities. I submit this affidavit, which is based upon my personal knowledge and review of records maintained by the New York City Police Department, in support of the plaintiffs' application for a temporary restraining and closing order and motion for a preliminary injunction. I am signing this affidavit under my shield number only because disclosing my name could impede my ability to operate as an undercover officer and possibly jeopardize my physical safety.

2. On June 10, 1998, along with other members of MSVES, I participated in an official investigation of an establishment, currently doing business as "FOREVER YOURS", located on the first, second (first and second floors being one duplex apartment) and third floors of the building at 332 East 22nd

Street, New York, New York, (hereinafter referred to as the "subject premises").

3. On June 10, 1998, while in an undercover capacity, I *scheduled an appointment* for 5:00 p.m. by answering an advertisement in *Action* magazine for an establishment operating under the name FOREVER YOURS and by calling the listed telephone number 212-982-2747. I was informed by the female who answered the telephone that the establishment only does "out calls" but could arrange for me to go to an apartment that was set up by the establishment. The female also informed me that the establishment had several races of women for me to choose from and that the cost would be three hundred (300) dollars, in cash, for one hour of their services. I requested a white female and the female on the telephone described the girl to be offered to me and included her physical measurements. The female on the telephone told me to call again from the corner of 22nd Street and First Avenue and I would then be advised where to go.

4. At 5:00 p.m. on June 10, 1998, I called the above telephone number from the corner of 22nd Street and First Avenue and the telephone was answered by the same female whom I spoke with on my initial call. She asked me to describe my surroundings, I complied and was directed to go to 332 East 22nd Street (the subject premises) and ring the doorbell to #3W.

5. I went to the subject premises and pressed the button for #3W. I was buzzed into the building, proceeded to the third floor and knocked on the door marked 3W. I was greeted at the door by a hispanic female, later identified as Melissa Salas. Ms. Salas told me to put whatever I had for her, referring to the money, on the counter between the bedroom and kitchen. I complied and told her that the $300 was placed. I asked Ms. Salas if I could perform oral sex on her and she replied, "sure, but that's going to cost you extra." I asked her how much extra and she replied, "fifty (50) dollars more." She directed me to

place the $50 with the $300 and I showed her that I was placing it.

6. A short time after, there was a knock on the door. Ms. Salas answered the door and a scantily clad female entered the premises arriving from the first floor. She informed Ms. Salas that the cops were at the premises.

7. A short time after, the MSVES field team entered the subject premises, arrested Ms. Salas and charged her with violating section 230.00 (prostitution) of the New York Penal Law.

8. Since January of 1998 there have been at least eight (8) arrests for prostitution inside the subject premises. Based upon the MSVES investigation of June 10, 1998 and a review of New York City Police Department records, I have no doubt that the first, second and third floors of 332 East 22nd Street are being operated as a house of prostitution.

/s/ #28564

UNDERCOVER POLICE OFFICER
SHIELD NO. 28564

Sworn to before me this
18th day of June 1998

/s/ Lee S. Siegel

Notary Public

LEE S. SIEGEL
Notary Public, State of New York
No. 02SI5054841
Qualified in Kings County
Commission Expires January 29, 2000

Exhibit D to Mirabile Declaration -
Affidavit of Undercover Police Officer
Shield No. 2671

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE CITY OF NEW YORK,
et al.,

Plaintiffs,

– against –

EVADNE BAKER (A/K/A/
EVADNE AUCHAMBAULT),
et al.,

Defendants.

AFFIDAVIT

Index No.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

UNDERCOVER POLICE OFFICER, SHIELD NO. 2671, being duly sworn, deposes and says:

1. I am a member of the New York City Police Department. I am assigned to the Manhattan South Vice Enforcement Squad (hereinafter "MSVES"), where my duties include the enforcement of laws concerning prostitution and related activities. I submit this affidavit, which is based upon my personal knowledge and review of records maintained by the New York City Police Department, in support of the plaintiffs' application for a temporary restraining and closing order and motion for a preliminary injunction. I am signing this affidavit under my shield number only because disclosing my name could impede my ability to operate as an undercover officer and possibly jeopardize my physical safety.

2. On February 15, 1998, along with other members of MSVES, I participated in an official investigation of an establishment, currently doing business as "FOREVER YOURS", located on the first and second floors (first and second floors being one duplex apartment) of the building at 332 East 22nd

Street, New York, New York, (hereinafter referred to as the "subject premises").

3. On February 15, 1998, at approximately 2:30 p.m. while in an undercover capacity, I scheduled an appointment for 3:30 p.m. by answering an advertisement in *Action* magazine for an establishment operating under the name FOREVER YOURS and by calling the listed telephone number 212-982-2747. I was informed by the female who answered the telephone that the cost for "full service" would cost two hundred (200) dollars for one hour of their services. The female also told me to call again from the corner of 22nd Street and First Avenue and I will then be advised of the exact location where to go.

4. At 3:30 p.m. on February 15, 1998, I called the above telephone number from the corner of 22nd Street and First Avenue and the telephone was answered by the same female whom I spoke with on my initial call. The female directed me to go to 332 East 22nd Street, (the subject premises), ring the bottom buzzer and she would let me inside the premises.

5. I went to the subject premises, pressed the bottom buzzer and was greeted at the door by a female, later identified as Carole Anthony. Ms. Anthony searched me, asked me for identification and then permitted me into the subject premises. Ms. Anthony introduced me to a female, later identified as Amy Myers, who led me into a bedroom. Ms. Myers removed her clothes, agreed to masturbate herself and have sexual and oral intercourse with me in exchange for two hundred twenty (220) dollars.

6. Shortly after, I identified myself as a NYC Detective and arrested Ms. Anthony who was charged with violating section 230.20 (promoting prostitution) and section 230.40 (permitting prostitution) of the New York Penal Law. Additionally, I arrested Ms. Myers, who was charged with violating section 230.00 (prostitution) of the New York Penal Law.

7. Based upon the results of the MSVES investigation on February 15, 1998 and a review of New York City Police Department records, I have no doubt that the first and second floors of 332 East 22nd Street are being operated as a house of prostitution.

/s/ v/c detective #2671
UNDERCOVER POLICE OFFICER
SHIELD NO. 2671

Sworn to before me this
23rd day of June 1998

/s/ Lee S. Siegel
Notary Public

LEE S. SIEGEL
Notary Public, State of New York
No. 02SI5054841
Qualified in Kings County
Commission Expires January 29, 2000

Exhibit E to Mirabile Declaration -
Affidavit of Undercover Police Officer
Shield No. 3512

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE CITY OF NEW YORK,
et al.,

Plaintiffs,

– against –

EVADNE BAKER (A/K/A/
EVADNE AUCHAMBAULT),
et al.,

Defendants.

AFFIDAVIT

Index No.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

UNDERCOVER POLICE OFFICER, SHIELD NO. 3512, being duly sworn, deposes and says:

1. I am a member of the New York City Police Department and currently assigned to a Transit District. I was previously assigned to the Manhattan South Vice Enforcement Squad (hereinafter "MSVES"), where my duties included the enforcement of laws concerning prostitution and related activities. I submit this affidavit, which is based upon my personal knowledge and review of records maintained by the New York City Police Department, in support of the plaintiffs' application for a temporary restraining and closing order and motion for a preliminary injunction. I am signing this affidavit under my shield number only because disclosing my name could impede my ability to operate as an undercover officer and possibly jeopardize my physical safety.

2. On January 31, 1998, along with other members of MSVES, I participated in an official investigation of an establishment, currently doing business as "FOREVER YOURS", located on the first and second floors (first and second floors

being one duplex apartment) of the building at 332 East 22nd Street, New York, New York, (hereinafter referred to as the "subject premises").

3. On January 31, 1998, while in an undercover capacity, I scheduled an appointment for approximately 2:00 p.m. by answering an advertisement in *NY Sex Guide* for an establishment operating under the name FOREVER YOURS and by calling the listed telephone number 212-982-2747. I was asked by the male who answered the telephone what the "code word" was. I told him, "atari," which I had obtained earlier from other members of MSVES. The male then told me to come to the first floor at 332 East 22nd Street, ring the buzzer and use the code word "Atari".

4. At approximately 2:00 p.m. on January 31, 1998, I went to the above stated address, rang the buzzer and a male, later identified as Stephan Richards, came to the door and asked me for the code word. I said, "atari" and he let me into the first floor apartment. In the living room area, there were four females sitting on a couch. Mr. Richards pointed to the females and asked me which girl I wanted. I asked for two girls and a female, later identified as Jodi Bendfeld, stated, "that will be one hundred fifty (150) dollars, for each girl, for one-half hour for our services. I said, "o.k.," and I was led up a spiral staircase to a bedroom on the second floor by Ms. Bendfeld and a female, later identified as Rosanna Gomez.

5. Inside the bedroom, Ms. Bendfeld stated, "I'll take the money." I handed Ms. Bendfeld three-hundred (300) dollars U.S. currency plus extra currency for a tip, for each female. Both females told me to undress and sit down on the bed. Both females then exited the room and, when they returned, they both got on the bed with me. Ms. Gomez was wearing lingerie and Ms. Bendfeld was wearing a "G-string".

6. A short time after, members of the MSVES team entered the subject premises. Based upon our agreement for

sexual intercourse in exchange for U.S. currency, Jodi Bendfeld, Rosanna Gomez, Jennifer Reyes and Amy Meyers were arrested and charged with violating section 230.00 (prostitution) and Stephan Richards was arrested and charged with violating section 230.40 (permitting prostitution) of the New York Penal Law.

7. Based upon the results of the MSVES investigation on January 31, 1998 and a review of New York City Police Department records, I have no doubt that the first and second floors of 332 East 22nd Street are being operated as a house of prostitution.

/s/ 3512

UNDERCOVER POLICE OFFICER
SHIELD NO. 3512

Sworn to before me this
22nd day of June 1998

/s/ Lee S. Siegel

Notary Public

LEE S. SIEGEL
Notary Public, State of New York
No. 02SI5054841
Qualified in Kings County
Commission Expires January 29, 2000

DECLARATION OF SERVICE BY MAIL

I, Maria Guadalupe Rocco, declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury that on June 9, 2000, I caused to be served the annexed Notice of Motion, Declaration in Support of Defendants' Motion, and Memorandum of Law upon the following counsel of record by depositing a copy of same, enclosed in a first class postpaid properly addressed wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service, within the State of New York, directed to said attorneys at the address set forth below, being the address designated by said attorney for that purpose:

Leon Friedman Esq. And Richard Ware Levitt
Attorney for Plaintiff
148 East 78th Street
New York, New York 10021
212-737-0400

Dated: New York, New York
June 9, 2000

/s/ Maria Guadalupe Rocco
MARIA GUADALUPE ROCCO

Leon Friedman (LF #7124)
148 East 78th Street
New York, New York 10021
(212) 737-0400

Richard Ware Levitt (RL #9177)
148 East 78th Street
New York, New York 10021
(212) 737-0400

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVON WALSH

Plaintiff,

– against –

99 Civ. 4586
(Judge Buchwald)

THE CITY OF NEW YORK and
LEE S. SIEGEL

Defendants.

DECLARATION IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Leon Friedman, an attorney duly admitted to the Courts of the State of New York, affirms under penalties of perjury.

1. I am one of the attorneys for the plaintiff in the above matter, and I make this Affirmation in opposition to Defendants' Motion for Summary Judgment.

2. For the reasons stated in the accompanying Memorandum of Law, the motion must be dismissed. First, defendants have not complied with the requirements of Local Rule 56.1(a) and has not supplied a "separate short, and concise statement

of the material facts as to which the moving party contends there is no genuine issue to be denied." Second, there is a genuine dispute as to many material facts on which the motion is based (including the facts relating to the basis for the search of plaintiff's apartment, the extent of the search, the disappearance of probable cause for the search after the apartment was entered by the defendants). Third, as a matter of law, defendant Siegel is not entitled to absolute prosecutorial immunity since, assuming that a lawyer in a civil enforcement proceeding can claim such immunity, the acts of which plaintiff complains were not "prosecutorial" in nature, namely signing the complaint as a witness and participating in the search. Fourth defendant Siegel cannot assert qualified immunity at this stage with so many material facts in dispute. Finally, the City of New York cannot be dismissed on *Monell* grounds, since material facts are in dispute as to the scope of Mr. Siegel's authority.

3. Attached as Exhibits to this Affirmation are the following:

Exhibit A: Deposition of Devon Walsh

Exhibit B: Deposition of Lee Siegel

Exhibit C: Deposition of Sgt. Jaskaran

Exhibit D: Affidavit of Undercover Officer Shield 3512

Exhibit E: Affidavit of Undercover Officer Shield 2671

Exhibit F: Affidavit of Undercover Officer Shield 28564

Exhibit G: Affirmation of Lee Siegel

Exhibit H: Order to Show Cause

Exhibit I: Consent Agreement

Exhibit J: Summons and Complaint

Dated: New York, N.Y.
June 22, 2000

/s/ Leon Friedman
Leon Friedman (LF#7124)

Exhibit B to Friedman Declaration -
Deposition of Defendant Lee S. Siegel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVON WALSH,

Plaintiffs, 99 Civ. 4586

vs.

THE CITY OF NEW YORK and
LEE S. SIEGEL,

Defendants.

DEPOSITION of LEE S. SIEGEL, a, Defendant herein, taken by Plaintiff, pursuant to Notice, at the offices of Leon Friedman, 148 East 78th Street, New York, New York, on Wednesday, May 3, 2000, at 2:41 a.m., before Linda Fisher, a Certified Shorthand Reporter, Certified Realtime Reporter and notary public, within and for the State of New York.

TANKOOS REPORTING COMPANY, INC.

11 John Street
New York, N.Y. 10038
(212) 349- 9692

142 Willis Avenue
Mineola, N.Y. 11501
(516) 741-5235

APPEARANCES:

LEON FRIEDMAN, ESQ.
Attorney for Plaintiff
148 East 78th Street
New York, New York 10021

MICHAEL HESS, ESQ.
Corporation Counsel
Attorneys for Defendants
100 Church Street
New York, New York 10007

BY: CATHERINE MIRABILE, ESQ.

* * *

IT IS HEREBY STIPULATED AND AGREED that all objections, except as to the form of the questions, shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within examination may be subscribed and sworn to before any notary public with the same force and effect as though subscribed and sworn to before this court.

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REQUESTS FOR INFORMATION

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[5]

LEE SIEGEL, having been first duly affirmed, was examined and testified as follows:

THE REPORTER: Please state your name and address for the record.

THE WITNESS: Lee Siegel, 465 Columbus Avenue, Valhalla, New York, 10595.

EXAMINATION BY MR. FRIEDMAN:

Q. Mr. Siegel, my name is Leon Friedman. I represent the plaintiff in this action, and I'm sure you've gone through depositions before. Is there any reason why you aren't able to answer the questions that I'll be asking you today? Are you on medication or some other reason why you won't be able to respond?

A. No.

Q. Could you tell me what your current position is?

A. Executive agency counsel for the New York City DEP police.

Q. Executive agency counsel for, I'm sorry?

A., New York City Department of Environmental Protection Police.

[6]

Q. And how long have you been in that position?

A. Since August of '99.

Q. Just very briefly, what are your functions in that position?

A. I actually manage the Police Department.

Q. You manage the DEP police?

A. DEP police, yes.

Q. And how many members are there in the DEP police?

A. Currently, there is approximately 92.

Q. And what are the functions of the DEP police?

A. To enforce the rules and regulations of the watershed belonging to New York City and all property and persons within the watershed.

Q. And that's up, for the most part, that's up in upstate New York, is that correct?

A. Yes.

Q. Do the police go out there and look and see whether it's being polluted or something bad is happening to the watershed?

A. Yes.

[7]

Q. And you manage them. To whom do you report?

A. To, well Robert Chicola is the director.

Q. How does he spell his name?

A. C-h-i-c-o-l-a.

Q. And he's the director of the New York City DEP?

A. Police, yes.

Q. Of the police?

A. Right.

Q. You say you manage, oh, I'm sorry, you're executive agency counsel.

A. Yes.

Q. And so what do you do as executive agency counsel?

A. I actually, my role is deputy chief of police, and I manage the department, as well as give legal advice.

Q. To Mr. Chicola?

A. To the department as a whole.

Q. And what is Chicola's official title?

A. He's acting director.

Q. Now, who does Mr. Chicola report to?

[8]

A. He goes directly to the executive staff, which would be the Commissioner's office.

Q. And the Commissioner of what?

A. Of DEP.

Q. Of New York City DEP?

A. Right.

Q. Who is the Commissioner?

A. Joel Miele.

Q. Joel M-i-e-l-e?

A. M-i-e-l-e, yes.

Q. And who does he report to?

A. To my knowledge, would be the deputy mayor, Joel Loda.

Q. Okay, before you worked as executive agency counsel for the DEP, what was your job? What was your next precedent job?

A. I was assistant counsel in the Mayor's office of midtown enforcement.

Q. Assistant counsel of Mayor's office for midtown enforcement?

A. Mayor's office of midtown enforcement.

Q. Mayor's office of midtown enforcement. And how long were you in that job?

[9]

A. Since—

Q. I mean, if you took this job, if your latest assignment is August of '99—

A. Approximately a year.

Q. And that will take us to the summer of '98.

A. Correct.

Q. Well, the incident that we're talking, that's the subject of this lawsuit happened on June, I think it was June 25th. Were you in that job at that time? Were you assistant counsel of the Mayor's office of midtown enforcement at that time?

A. At which time?

Q. This is August 25th of 1998.

MS. MIRABILE: Was it August?

MR. FRIEDMAN: I'm sorry, June 25th.

A. Yes.

Q. So how soon—how long had you been in that position when this incident occurred, if you can remember.

A. As I recall, a little over a month.

Q. So you had that position since May of '98? Would that be—

[10]

A. Yes, I believe so.

Q. Before that, what was your job?

A. I was in private practice.

Q. With what firm?

A. It was my own.

Q. And generally, what kind of work did you do?

A. Did a little of everything. Some criminal, matrimonial, real estate.

Q. And where was your office located

A. 125—well, I worked out of my home, actually.

Q. Which was?

A. Which was in Brooklyn, New York.

Q. Now, how long were you in private practice? I just want to work backwards to law school.

A. Since June of '96.

Q. June '96 to May '98, you were in private practice.

A. Correct.

Q. And before—did you always work out of your office, out of your, home, is that where your practice was located?

[11]

A. Be more specific.

Q. Well, you say that you were working out of your home in Brooklyn, and I just want to be sure that your office was in the same place in that period.

A. Yes.

Q. Before June of '96, what did you do?

A. I was Assistant District Attorney in the Kings County DA's office.

Q. And how long were you an assistant DA?

A. Approximately two years.

Q. That would bring us back to the summer of '94?

A. '94, correct.

Q. And what did you do in the DA's office of Kings County, what kind of cases?

A. Misdemeanors.

Q. Before that, before June of '94?

A. I was in law school.

Q. Where did you go to law school?

A. Queens Law School, CUNY.

Q. So you entered June of '91?

A. I believe—

[12]

Q. Well, August of '91.

A. August of—yes, I think so.

Q. And before that, were you working or did you just graduate from college?

A. No, I was working.

Q. Where were you working before law school?

A. Family business.

Q. When did you graduate from college?

A. Approximately 1988 or so.

Q. So from 1988 to 1991, you were in the family business, is that correct?

A. That's correct.

Q. And where did you graduate from college? What college did you graduate from?

A. Touro College.

Q. Focussing on your job as assistant counsel of the Mayor's Office of Midtown Enforcement, is that it?

A. Yes.

Q. Assistant counsel, Mayor's Office of Midtown Enforcement.

A. Yes, that's correct.

Q. Now, who did you report to there?

[13]

A. Virginia Sullivan.

Q. What was her title?

A. She was counsel.

Q. How many people were in that office in June of '98?

A. Be more specific as to what role.

Q. Well, in other words, how many other lawyers were there? I just want to get the chain of title, if I can, or the chain of the table of organization.

A. It was myself, Virginia Sullivan and one other attorney, John Barous.

Q. John?

A. Barous.

Q. B-a-r—

A. B-a-r-o-u-s.

Q. And who did Virginia Sullivan report to?

A. To the director of the office.

Q. Of the Mayor's Office of Midtown Enforcement?

A. Yes, of midtown enforcement.

Q. And who was the director of the Mayor's Office of Midtown Enforcement?

[14]

A. William Daly.

Q. And how do you spell his name?

A. D-a-l-y. D-a-i-l-y. No, D-a-l-y.

Q. And who did he report to?

A. He reported to—I can't think of his name now.

Q. I can just leave a space here.

A. Yes, the name escapes me right now.

Q. I just want to get the chain of command, whoever the director was, right up to the Mayor's office. Whoever was the—

MS. MIRABILE: If you don't have his name, do you know what position he was in?

A. Yes, he was criminal justice coordinator for New York City.

Q. And above that, do you know how that runs?

A. No, I don't have that knowledge.

Q. So the criminal justice coordinator supervised or was in the chain of command above William Daly, is that right?

A. Correct.

Q. And then Virginia Sullivan reported to William Daly?

[15]

A. Correct.

Q. And you reported to Virginia Sullivan?

A. Right.

Q. Now, what functions did the Mayor's office of Midtown Enforcement perform?

A. Primary function was to close illegal establishments.

Q. What kind of illegal establishments?

A. Houses of prostitution, massage parlors, after hours clubs, gambling houses.

Q. Anything else?

A. At one point adult establishments.

Q. Adult bookstores or—

A. Peep shows, yes.

Q. Were there geographic limitations to your jurisdiction?

A. Yes.

Q. What were they?

A. From 14th Street to 59th Street, river to river.

Q. Was there something called the Mayor's office—what were the other parallel offices? In other words, was there another office

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downtown, below 14th Street? Mayor's Office of Downtown Enforcement?

A. Not to my knowledge.

Q. Well, what would happen if there was a peep show or a house of prostitution below 14th Street? Who would have jurisdiction over that?

A. The New York City Police Department. Their vice unit would handle that, and then NYPD legal would do the legal work for those cases.

Q. How about above 59th Street?

A. Same thing.

Q. So is it correct that there was one separate office for midtown enforcement, and there wasn't something precisely parallel either above or below your geographic limits? That would be handled by the Police Department?

A. Yes, correct.

Q. What about the other boroughs? Who would generally handle that?

A. Same thing.

Q. Now, you say their primary function was to close illegal establishments. Pursuant to what legal authority did your office operate?

A. We used the nuisance abatement law.

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Q. And that's nuisance abatement law 7-710, et seq.?

A. Yes.

MR. FRIEDMAN: Let's mark this as Plaintiff's Exhibit 1.

(Plaintiff's Exhibit 1 was so marked for identification.)

Q. I show you what's been marked as Plaintiff's 1, and ask if you can identify this?

A. It's a copy of Chapter 7 of the nuisance abatement law.

Q. Is this the authority under which your office operated?

A. Yes.

Q. Now, the law refers to Corporation Counsel as bringing an action. If you look at 704. "The Corporation Counsel shall bring and maintain a civil action." And also, Section 706 refers to Corporation Counsel. Now, was your office considered part of the Corporation Counsel's office?

A. We were of counsel to Corporation Counsel.

Q. And did you—all right, I'll come to

[18]

that in just a second.

How would you—you refer to the fact that your primary function was to close illegal establishments such as houses of prostitution. How would you know that there was a house of prostitution operating somewhere?

A. Majority of the times, the New York City Police Department's vice unit would find out information, they would investigate and when their investigation brings enough evidence or arrests that would pertain to the law, then they would come to us and we would seek a closing order.

Q. So that you didn't direct them to look at a particular place, they would come to you and tell you that they had located something that would fit within the public nuisance law, is that right?

A. Correct.

Q. Now, before—again, we're going to talk about an incident that happened on June 25th. Before the incident involving 332 East 22nd Street, had you done a prior motion to close an establishment? You started in May of '98. What I want to know is was this your first case?

[19]

A. I don't recall.

Q. Well, let me mark a couple of papers. Let's mark this as 2.

(Plaintiff's Exhibits 2 and 3 were so marked for identification.)

Q. Showing you what's been marked as Plaintiff's 2, do you recall the circumstances—looking at the very end, did you prepare this document?

A. Yes.

Q. And that is your signature at the very end, on page 21?

A. Yes, it is.

Q. Do you recall the circumstances under which this particular document was prepared?

A. Give me one second, please.

Yes, I recall the circumstances.

Q. Tell us what happened.

A. At what point?

Q. Well, the first time that you became aware that there was a problem at 332 East 22nd Street.

A. The vice unit sent us, got in touch with us and told us that they had made several

[20]

arrests at that location. I believe, as I recall, it was on two separate days that they made arrests.

At that point, that's all that was—

Q. Now, who from the vice unit told you about this?

A. Well, the case was given to me by Virginia Sullivan.

Q. Right.

A. She told me that the arrests were made, and to work on the case.

Q. Did she tell you when the arrests had been made?

A. I don't recall.

Q. Again, do you recall whether this was the first time she asked you to prepare papers of this kind?

A. I don't really recall.

Q. Well, while you were there, you were there for approximately a year, how many times did you seek an order similar to this one under the nuisance abatement law?

A. Approximately eighteen.

Q. Now, in this case, after she told you

[21]

that arrests had been made, and then what did she tell you?

A. She gave me the file and she told me to begin working on the case.

Q. And what did she tell you to do?

A. Just to work on the case.

Q. And what did that mean?

A. At that point, I had to do what would normally be done to begin a case like this.

Q. Which is what? Prepare? I know this sounds obvious, but prepare a closing order, is that correct?

A. Well, to prepare the documents that we have in front of us now.

Q. All right, and what are those?

A. We have an affirmation.

Q. I'll show you what's been marked as an order to show cause.

A. And an order to show cause.

Q. And the order to show cause seeks, again, just describe in your own words what relief does the order to show cause seek?

A. From use and occupancy of the first, second and third floors of the building. The

[22]

premises shall be closed. From conducting, maintaining, and operating the subject premises as a house of prostitution or permitting any such acts.

Q. Gaining access to the establishments, is that correct? Looking at page, at paragraph 1 on page, I guess there's no page number here. But the order sought, the legal papers in front of you sought an order enjoining someone from using or occupying the first, second and third floor of the building, is that correct?

A. Correct.

Q. And in addition, commanding all persons present to vacate the premises, is that correct?

A. That's correct.

Q. And to make an inventory of the personal property, is that correct?

A. That's correct.

Q. And to lock the premises securely once they've been vacated. Is that correct?

A. Correct.

Q. Taking a look at what's been marked as Plaintiff's 3, the order to show cause, did you

[23]

prepare this?

A. Yes.

Q. And did you have—on what basis did you prepare this particular document? Did you have a model to look at?

A. Yes.

Q. And who gave you the model?

A. We had it in the computers from previous cases.

Q. Did Virginia Sullivan give you instructions on how to prepare this document?

A. No. Not to my knowledge. Not that I recall.

Q. Well, how did you know, you were there a month or less than a month. How did you know what to do?

A. I don't really recall. I may have done one before. I don't even remember.

Q. Have you ever done one of these when you were at the DA's office?

A. No.

Q. Do you recall whether you asked anyone's help in preparing these papers?

A. I don't recall any.

[24]

Q. You said that there was something in the computer. Well, do you remember whether you spoke to, who is the other counsel there, Mr. John Barous?

A. Barous, yes.

Q. Barous. Did you ask for his help in this?

A. I don't recall asking for help.

Q. You said it was in the computer.

A. Correct.

Q. Let me just take a half step backwards. According to—the order is signed, I think it was June 25th, is that right? Do you recall when the order was signed?

A. Without looking at the document, I don't recall.

Q. On the order to show cause, it says on it, "At an individual assignment part held in and for the County on the 25th of June." There's no—do you remember, when you went into Part 1, do you recall—is this your handwriting? I'm sorry, or is that the Judge's handwriting?

A. That's my handwriting.

Q. Well, your affidavit was sworn on

[25]

June 23rd. Do you recall how long after your affidavit was prepared that you actually went into Court?

A. I don't really recall.

Q. Do you know how long—Virginia Sullivan told you to prepare these papers. Do you recall how far before June 25th she told you to work on it? Was it a week before? Two weeks?

A. I don't really recall.

Q. When she called you in and told you to work on the papers, how long was that conversation?

A. I don't really remember.

Q. I mean, was it ten minutes? An hour?

A. I really don't—it wouldn't be that long. She probably just gave me the case, and that was it.

Q. I think you told us you're not sure whether this was your first assignment. Had you worked on any case involving a massage parlor—

MS. MIRABILE: Prior to this?

MR. FRIEDMAN: Prior to this.

A. I don't recall what cases I worked on prior to this. I remember going out on a closing

[26]

when I first began, but I don't remember what cases I worked on in what order.

Q. Were you given any training prior to taking on this assignment? I'm sorry, prior to working, starting work in the Mayor's office? Go down to Corp Counsel or somewhere and given any training about what to do?

A. Well, Virginia Sullivan trained me.

Q. And how long did that training occur?

A. From the day I began.

Q. Did you have a formal training session?

MS. MIRABILE: He's asking if you had any type of orientation or training.

A. No.

Q. Let me just take a half a step back. How did you get the job to begin with? Did you send your resume to somebody?

A. Yes.

Q. Who did you send the resume to?

A. I don't really recall. I don't remember who it went to.

Q. Were you interviewed by Virginia Sullivan?

[27]

A. Yes.

Q. Did you send a resume to her or to someone else in city government generally? To whom did you send the resume, if you can remember?

A. I don't really remember.

Q. Well, were you seeking a job in the Mayor's office in particular or in some other legal office in the City?

A. Just seeking a job generally.

Q. Did you send it to Corp Counsel or did you send it to the Mayor's office? Do you recall to whom you sent it?

A. It may have been the Mayor's office.

Q. Did you know someone in the Mayor's office?

A. No, I heard that the job was available, and I, the resume I think, I sent it down to the Mayor's office, but I don't remember who. I don't recall that.

Q. Where did you hear that a job was available?

A. A friend of mine.

Q. Well, were you interviewed by Virginia Sullivan?

[28]

A. Yes.

Q. Were you interviewed by somebody else, anyone else?

A. No.

Q. Do you know how long that interview took?

A. At least an hour.

Q. And did she describe what the functions of the job were?

A. Yes.

Q. And what did she tell you?

A. That they used the nuisance abatement law, and that they would go out and go and close illegal establishments that fell under, that were violating the nuisance abatement law, and just explained how the office worked.

Q. Now, the first day that you started, did she immediately give you a job to do?

A. Yes.

Q. And do you recall what that was?

A. I remember it was to work on a case, but I don't remember which case it was.

Q. Was it this case?

A. No.

[29]

Q. Was it a closing case?

A. Yes.

Q. Was it closing a house of prostitution?

A. I don't recall specifically.

MR. FRIEDMAN: Let me mark, let's mark this as 4.

(Plaintiff's Exhibit 4 was so marked for identification.)

Q. Looking at what's been marked as 4, did you prepare this affidavit?

A. I believe so.

Q. Did you speak to undercover police officer shield No. 3512?

A. I don't remember whose name goes with that shield number, but looking at this affidavit, I remember speaking to an officer.

Q. But you took his notary? In other words, he signed it in front of you.

A. Correct.

Q. How many times did you meet with shield No. 3512?

A. At least once. I don't recall any other time.

[30]

Q. Did you talk to him on the telephone?

A. No.

Q. How did you know what to put in the affidavit?

A. I got the paperwork, the arrest reports, and after reviewing that and knowing who the officers were that were involved in this case, I called him to my office.

Q. Well, let me ask you this: Was this prepared before you saw him and he came in and just signed it, or was he in your office some period of time and did he participate in the preparing of Plaintiff's 4?

A. I prepared it while he was there.

Q. While he was there.

A. Yes.

Q. And it was based on what?

A. Based on the information he had given me verbally, as well as the paperwork that he prepared.

Q. How long was he with you before the document was finalized? An hour? Two hours?

A. At least an hour.

Q. Did you have a model to base this

[31]

affidavit on?

A. Yes.

Q. And where was that model?

A. My computer.

Q. In your computer?

A. Yes.

Q. Now, had that computer been used by someone else before you were there? In other words, apparently, again, I don't want to put words in your mouth, but there was a model affidavit in your computer.

A. There was, there's a, how can I say, an interoffice sort of, everybody's computer—

Q. Hooked in?

A. Hooked into the same information.

Q. I see. Well, was there a file name on it? "Affidavit?" "Cop affidavit?" I don't know how you knew what to look for. How did you know what to look for?

A. I believe I looked under "Affidavit."

Q. And this was signed on June 22, 1998?

A. Correct.

MR. FRIEDMAN: Let's mark this as 5.

(Plaintiff's Exhibit 5 was so marked

[32]

for identification.)

Q. Did you prepare what's been marked as Plaintiff's Exhibit 5?

A. Yes, I believe so.

Q. And this refers to Shield No. 2671, Detective 2671.

A. Yes, correct.

Q. What's the difference between undercover, an undercover police officer and an undercover police detective?

A. Just the rank. Some officers made detective and some still have police officer rank.

Q. Now, do you recall when you prepared what's been marked as Plaintiff's Exhibit 5?

A. I remember preparing the facts.

Q. And on what did you base the facts?

A. Same thing. The police paperwork that was prepared, as well as calling the officer in and interviewing the officer.

Q. Do you know how long you spent with officer or Detective 2671?

A. I don't remember who that officer was by shield number, but I remember by preparing this, I spent also at least an hour with the

[33]

officer.

Q. And this was on June 23rd?

A. Correct.

Q. And Exhibit, Plaintiff's 4 was on June 22nd.

A. Correct.

Q. You recall one officer coming in one day and the other officer coming in the next day?

A. Yes.

Q. So the affidavit was based on two things; police records of an arrest, is that right?

A. That's correct.

Q. And your interview?

A. Correct.

Q. And using the model in the computer, and looking at both the records and discussing the matter with the police officer, you then prepared this affidavit.

A. Correct.

Q. I think I'm doing more testifying than you are, but I just want to move it along.

Now, Plaintiff's 4 refers to the fact that the officer answered an advertisement in the

New York Sex Guide. Now, do you know who gave instructions to the officer to look in the New York Sex Guide?

A. No.

Q. That wasn't you?

A. No.

Q. As far as you know, that wasn't your office?

A. No.

Q. Do you know whether the vice squad does that kind of investigation?

A. Yes.

Q. And this refers to an arrest made on January 31, 1998. Paragraph 3.

A. Correct.

Q. Do you know what happened to the people who had been arrested?

A. I don't remember.

Q. In paragraph 6, they were arrested and charged with violating Section 230. Do you recall whether they were found guilty or pleaded guilty?

A. I don't recall.

Q. Plaintiff's 5 refers to a magazine

[35]

called Action magazine. Paragraph 3.

A. Correct.

Q. Did you give instructions to Detective 2671 to read that magazine?

A. No.

Q. Or to answer the advertisement?

A. No.

Q. That was done by the vice squad, is that correct?

A. Correct.

MR. FRIEDMAN: Let's mark this as Exhibit 6.

(Plaintiff's Exhibit 6 was so marked for identification.)

Q. Looking at Plaintiff's 6, did you prepare this affidavit?

A. Yes, I did.

Q. And this one is signed on June 18.

A. Correct.

Q. Which was, what, four, five days before the others.

Do you recall this officer coming in—I don't know if we have a calendar anywhere around. Do you remember what day of the week you

[36]

started on this project?

A. No.

Q. And this refers to June, an arrest made on June 10, 1998. Is that correct?

A. Correct.

Q. So there was an arrest in January, according to these affidavits, an arrest in February, and then an arrest in June.

A. Correct.

Q. Is there some policy about how many arrests should take place before you move for a closing order under the public nuisance law?

A. Yes.

Q. What is the policy?

A. At least two arrests on two separate days.

Q. Two arrests on two separate days. Where is this policy, is it found in some rule, regulation? You think it might be in the statute?

A. I believe so.

Q. I see, two or more criminal convictions of persons—this is 703—within a one year period.

Do you know why there were two

[37]

arrests, one arrest in January and one arrest in February? Do you know why they waited until the arrest in June to take further action?

A. I don't really know.

Q. So, according to the—well, if you look at paragraph 8—

MS. MIRABILE: of which document?

Q. Of Plaintiff's 5—I'm sorry, Plaintiff's 6. It says, "Since January of 1998, there have been at least eight arrests for prostitution." How did you know that?

A. Police records.

Q. You recall looking at police records that showed that information?

A. Yes.

Q. If you look at paragraph 5 of Plaintiff's 6, all right, let's take a look at the paragraph before. It refers to ringing the doorbell at 3W. How did you know that the officer rang the doorbell at 3W?

A. He told me. As well as it being on the paperwork.

Q. And this paperwork reflects the fact that the officer went to 3W, rang the bell and was

[38]

greeted by a Hispanic female identified as Melissa Salas, S-a-l-a-s. And it also refers in paragraph 7 to the fact that she was arrested.

A. Yes.

Q. Now, looking at paragraph 8, the affidavit says, last paragraph, "Based on the MSVES investigation of June 10, 1998 and a review of New York City Police records, I have

no doubt that the first, second and third floors of 332 East 22nd Street are being operated as a house of prostitution.

You prepared this affidavit, is that correct?

A. That's correct.

Q. Did you know how many apartments there were on the third floor?

A. Yes.

Q. How many were there?

A. I was told there were two.

Q. And what were the apartment numbers?

A. 3W, I believe the other one was 3E, if I recall.

Q. Did you have any evidence whatsoever that apartment 3E was being used for the purposes

[39]

of prostitution?

A. That's what the officer told me. He told me that the two apartments were connected.

Q. Did you try to verify that in any way?

A. I remember asking him the day that he gave me the information, twice. I remember getting a diagram made by the officer of what the layout looked like, and based on that, that was all that I could go by.

Q. Do you know where that diagram is right now?

A. I don't know.

MR. FRIEDMAN: I'd ask for its production.

MS. MIRABILE: Take it under advisement. If you have a request, follow it up in writing.

MR. FRIEDMAN: Okay.

Q. Do you know whether there was any arrest record of any kind relating to apartment 3E?

A. I don't recall.

Q. Was there any other evidence relating

[40]

to apartment 3E that you recall, relating to any prostitution occurring in apartment 3E?

A. Not that I recall.

Q. So it's only this officer's statement, is that correct?

A. I believe so, yes.

Q. Well, looking at what's been marked as 4 and 5, is there any reference at all to the third floor?

MS. MIRABILE: May I while he's looking at that, run to the rest room?

(Brief recess.)

BY MR. FRIEDMAN:

Q. Mr. Siegel, I'd like you to look at Plaintiff's 3. I'm sorry, Plaintiff's 4. If you look at paragraph 2, it refers to the first and second floors being one duplex apartment.

A. Correct.

Q. And you put that in to justify closing down everything on the first and second floor, isn't that correct?

A. Correct.

Q. Taking a look at Plaintiff's 5, paragraph 2, that also refers to the first and

[41]

second floor being one duplex apartment, is that correct?

A. Correct.

Q. And that also justifies closing both the entire first and second floor, is that correct?

A. That's correct.

Q. But when you look at Plaintiff's 6, there's no reference to the entire third floor being one apartment, is there? Is there? Let me ask you that. Is there anywhere in this affidavit that you state that apartment 3W and apartment 3E are one apartment? Is that anywhere in that affidavit?

A. No.

Q. Did you ask the officer any questions about apartment 3E?

A. Yes.

Q. What did you say? What did you ask him?

A. Well, first I asked him what was on the third floor, and he told me that there were two doors and it seemed to be one apartment, and I asked him again specifically, I remember that, are

[42]

the two apartments connected, and he told me yes.

Q. Did he say on what basis did he make that judgment that they were connected?

A. Well, he was the officer in the apartment, and from what he remembered, he thought that there was a way to get from one apartment to another. And that it was just two doors for one apartment.

Q. And I think you mentioned before the break that he actually drew a picture.

A. Yes, there was a picture, yes.

Q. Now, I want your recollection of everything that was said about 3E between you and the officer. Have you told us everything or is there anything else that you asked him or he volunteered about apartment 3E? Did you ask him were any arrests ever made in 3E?

A. I don't recall what else I asked him. As far as arrests go, again, I see the complete file on the case, and I go by that. And the specific officer that I call in, I just ask about his specific situation.

Q. Well, take a look at paragraph 4. The officer—

[43]

A. Which exhibit?

Q. Of Exhibit 6. He made a phone call and the officer was saying, "I was directed to 332 East 22nd Street and rang the doorbell to 3W."

Now, did you ask him—and you discussed this with him?

A. Yes.

Q. Did you ask him whether there was another apartment on the third floor?

A. I asked him what else was on the third floor.

Q. And what did he say?

A. He said there was another door.

Q. And then what did he say or what did you ask him after that?

A. I asked him if that door was part of the same apartment or if there were two separate apartments.

Q. And he said?

A. And he said that the two apartments—the two apartments were actually connected.

Did you ask him on what basis did he make that statement?

[44]

A. Yes.

Q. And what did he say?

A. He told me he saw a way that it adjoined.

Q. Did you ask him any other questions about that? I mean, at what point did you ask him to draw a picture?

A. I think I asked him where the two apartments joined, and he told me that it was as you entered to the right.

Q. Were you ever in those two apartments?

A. Yes.

Q. Could you describe them for us?

A. 3W, when you enter, there's an open space that—

Q. I'm going to ask you, if you could, just in the sketchiest way, we'll mark this as an exhibit.

MS. MIRABILE: I'm going to object to him drawing anything. Certainly nothing is going to be marked to scale. There are photographs, I don't mind him marking photographs, marking anything that's already pictured on a

[45]

photograph.

MR. FRIEDMAN: I certainly can ask him to verbally describe it.

MS. MIRABILE: I'll let him verbally describe it, but to have him actually draw something which is not going to be to scale, I have objections to him doing that. But I have no

problems with him verbally describing, I have no problem with him marking photographs.

Q. How many rooms were there in 3W?

A. 3W, when you walked in, there was a room, and that room, like an open space that had a bed, and then you had to make a sharp left, and it was a long hallway. Down that hallway, there was a kitchen, I remember a bathroom, and there may have been another bedroom at the very end.

Q. And to the right, this is all looking left down—

A. Right, correct.

Q. Looking to the right, what was there?

A. To the right was a wall.

Q. How about 3E?

A. 3E, when you entered the apartment, it went to the right. There would be a bathroom,

[46]

and a little kitchen area, but when you first entered there was a living room, and then go through the living room, there was a bedroom.

Q. All right, going back to what the officer told you, he went into 3W and it was there, according to—there's nothing at all about where this conversation occurred, is that correct?

MS. MIRABILE: Objection to the form.

Q. In other words, paragraph 5.

MS. MIRABILE: You're asking him about the conversation between the officer and a woman?

MR. FRIEDMAN: That's correct.

Q. Did you ask him before you prepared 5 where this conversation occurred?

A. Yes.

Q. And what did he tell you?

A. It occurred as he entered the apartment, and to the left of the door was a little counter, and that's where they spoke and that's where he placed the money.

Q: And he told you that it was connected—how did he tell you it was connected to

[47]

3E?

A. That there was, I believe he said that there was an opening to the right as when you entered 3W.

Q. Did you ever see any such opening?

A. No.

Q. But you're saying the officer told you there was such an opening?

A. Yes.

Q. Did he tell you in paragraph 6 there's reference to the fact that a scantily-clad female entered the premises, arriving from the first floor. How did he know she came from the first floor?

A. I remember asking him that. I believe the door was open, he saw her coming up the stairs.

Q. And how did the police know to come up and arrest Miss Salas at that time?

A. They have a certain procedure that they do, and they wait a given number of minutes and if the officer comes out before the time lapses, then they know no deal was made. And if he stays in beyond that time, they come up.

[48]

Q. Now, on paragraph 8, you referred to eight arrests for prostitution inside the subject premises.

A. Correct.

Q. Did you have those records in front of you?

A. Yes.

Q. Do you know whether any of those records referred to apartment 3E?

A. I don't really recall. I don't recall.

Q. Well, you prepared this affidavit saying that for this officer, saying "I have no doubt that the first, second and third floor are being operated as a house for prostitution." On what did you base the reference to the third floor?

A. On this officer's statement.

Q. On anything else other than this officer's statement?

A. I don't believe so.

Q. And on this map that he prepared, or this, you say he prepared some sort of sketch? I think that's what you said just before the break.

[49]

A. Yes, it was based on that.

Q. Did you ask him any questions—after he told you that they were connected, did you ask him to prepare a sketch of where they were connected?

A. I didn't. It was one of the officers that worked in my office.

Q. Well, who was present when your conversation with officer 28564 occurred?

A. Just myself.

Q. Well, what other officer prepared the sketch? Or who prepared the sketch?

A. We have police officers that worked in midtown enforcement, and they're the ones that gather whatever—they're the ones that come along with legal to execute the closings.

Q. Well, at what point was the sketch prepared?

A. I don't recall, but it was before we went to the location.

Q. Well, was it before June 18, 1998 when this affidavit was prepared?

A. No, it was prepared, I believe, right before the closing was executed.

[50]

Q. So you didn't have that sketch when you prepared this affidavit, is that correct?

A. Not that particular one, but he just—when we were talking about the layout of the place, he just sketched something out for me just to show me how the apartment, how the floor is situated, a quick sketch.

Q. And did that sketch show a connection between apartments 3W and 3E?

A. Yes.

Q. Well, how did it show it? What did it indicate showing the connection?

A. It showed that there was an open, just like an opening in the wall that just attached the two apartments, like you'd be going from one room to another.

Q. Well, I guess I'm missing something, here. There are two apartments—there are two doors in this apartment. I'm

sorry, there are two doors, one to each apartment, one to 3W and one to 3E.

A. Correct.

Q. So there's no other door in the hallway.

[51]

A. No.

Q. So he went into 3W.

A. Correct.

Q. And he made this offer for prostitution and put some money on the table.

A. Correct.

Q. That's what your affidavit says.

A. Right.

Q. Now, when he's in 3W, what kind of observation could he have made, or did he tell you he made, to show that it was connected to 3E?

A. He told me that there was a hole—not a man made hole, not just a hole in the wall, but like walking from one room to another.

Q. But why would that necessarily show it connected to 3E. Maybe it's just another room in 3W.

A. No, he told me that they were definitely connected.

Q. Well, did you ask him any questions about that? How did he know that? On what basis did he come to that conclusion?

A. He told me he saw into the other area.

[52]

Q. But again, how did you know the other area was not another room in that apartment or the other apartment? You see a door and you see another room, that could be the second apartment, it could be another room in that apartment. Isn't that correct?

A. That's correct. He told me he looked in, he saw in, and that they were connected, that it was the one apartment, because the two apartments joined like this (indicating).

MS. MIRABILE: When you say "like this" he's making an angle with his hands.

A. It joins like, it would be like an L shape.

Q. Well, when you went into 3E, did you see any connection of that kind?

A. No.

Q. Well, how do you explain the fact that he said there was such a connection?

A. When I asked him afterwards, he told me that it happened quite fast from the time he had gone into the apartment, and that he was concentrating on making the deal. Not too long after the other officers came up, there was a lot

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of excitement, that other woman had come up also and that he had made a mistake, and that, I guess you could say his bearings were off.

** MR. FRIEDMAN: I'm going to have to, I don't care about the other officers, but I'm certainly going to ask for the identity of 28564. I understand, I just want to put this on the record, that we're going to want to know his identity and we're going to want to take his deposition.

MS. MIRABILE: Just for the record, if he's still undercover, we obviously can't turn over his name. We can produce him for a deposition.

MR. FRIEDMAN: I don't care about his name.

MS. MIRABILE: I don't know if he's still an undercover as we're speaking. Discovery closes tomorrow, but we'll work something out.

MR. FRIEDMAN: We'll work something out, we'll go into the Judge and explain. We're going there on Friday. This is all new to us.

Q. Now, let's carry this forward. So that you had this conversation with 28564,

[54]

prepared this affidavit on June 18, then on June 22 and 23, you prepared Plaintiff's 4 and 5. What else did you do before you went to court?

A. Once the paperwork was ready to be filed, just went to Court and filed it.

Q. Now, your affidavit, which was Plaintiff's 2, was prepared on June 23rd. Is it correct that you didn't finish yours until the other three had been signed and executed?

A. The other three what?

Q. The other three affidavits, Plaintiff's 4, 5 and 6.

A. Right. Mine was finished after I spoke to all the officers.

Q. What else did you do prior to filing the papers? And then you prepared—did we mark the order to show cause?

MS. MIRABILE: I think that's 3. The order to show cause is Plaintiff's 3.

MR. FRIEDMAN: That's 3, I'm sorry.

Q. What else did you do?

A. After I filed it, came back to the office. The following day the closing order was picked up at the Court.

[55]

Q. Did you appear before the Judge or did you just file the papers?

A. I believe that the papers were, she signed it just by reading it and then we just came back to pick it up.

Q. Were you physically present before Judge Cohen?

A. I don't remember on that specific case.

Q. Now, after it was signed, what did you do?

A. Came back to the office, notified the rest of the individuals who were going to be going out on the closing, the police officers, that we got the closing, and we made copies of the order as well as the other documents, we got service ready.

Q. What do you mean, service ready?

A. We, once we get the order, we try to perform service for the building owner the same time that we execute the order.

Q. How did you know who the building owner was?

A. We researched the records.

[56]

MR. FRIEDMAN: Let's mark this as 7.

(Plaintiff's Exhibit 7 was so marked for identification.)

Q. Looking at what's been marked as Plaintiff's 7, can you identify this?

A. Yes, it's the summons and verified complaint.

Q. And who prepared this?

A. I did.

Q. And in conjunction with the other papers, when was this prepared?

A. Basically, it was all finalized the same time.

Q. At that point, it was verified by someone from Corp Counsel, Robin Binder?

A. Correct.

Q. How did she get in this?

A. Every time we prepare papers for a case, we have to get it verified by somebody from Corp Counsel, and it's usually a chief or a deputy chief of the department.

Q. Well, did all papers have to be verified?

A. All which papers?

[57]

Q. I mean, besides the summons and complaint, did someone from Corp Counsel look at what's been marked as Plaintiff's 2, 3, 4, 5 and 6?

A. Yes, all the papers are submitted to that person.

Q. And it was Robin Binder?

A. I believe so.

Q. Did you have any conversations with her at all?

A. I don't remember. I don't remember if I brought it down or my colleague did. I don't recall.

Q. Well, do you recall talking to her, either on the telephone or in person?

A. I don't really recall.

Q. Did you prepare the verification in blank? The next to the last page.

A. Yes.

Q. Did you know who was going to sign it?

A. Yes.

Q. Who is Robin Binder?

A. She's deputy chief of the

[58]

administrative law department.

Q. Did you have any discussions with her about the papers?

A. I don't really recall.

Q. Did you have any discussions with anyone from Corp Counsel about the papers? Before they were served.

A. I don't believe so.

Q. Did you have any discussions with Virginia—with your superior, what's her name, Virginia Sullivan?

A. Yes.

Q. What were those discussions?

A. I remember talking to her about who was going to be named in the caption. We did speak about what floors we were going to put in, and when the papers were done we always had a habit of reviewing one another's papers.

Q. Did you and her talk about the third floor in any way?

A. I believe so.

Q. What was the discussion?

A. I told her the facts and by the facts we decided what had to be put in.

[59]

Q. Did you mention the issue about 3E and 3W being connected?

A. Yes, I told her that the officer told me that there were two doors on the floor, it was, the apartments were connected and, as well as discussing the other two floors.

Q. Well, did she ask you to verify in any way that the two doors were connected?

A. No. I told her that the only way I was able to be certain on there was just by speaking to the officer.

Q. Now, downstairs, are there, were there separate buzzers for each apartment in the building, if you recall?

A. On each door—

Q. Well, when you went into 332 East 22nd Street, how do you get inside the building?

A. There was a buzzer on the outer part of the door.

Q. And were there buzzers next to each apartment?

A. I believe so.

Q. Do you know whether there were names next to each of the buzzers?

[60]

A. That I don't recall.

Q. Well, do you know what was next to the buzzers on the first and second floor?

A. I don't recall if there were buzzers or knockers on the door.

Q. No, in order to get into the apartment—in order to get into the building, was there a door that you had to be buzzed through in order to get into the building?

A. Yes.

Q. Was there one buzzer for the whole building or was there a buzzer for each apartment?

A. No, I believe that there were separate buzzers.

Q. Do you know where there were any names connected with each of the buzzers?

A. I don't remember.

Q. Did you ever ask any officer about that?

A. I really don't remember.

Q. Do you remember any officer discussing that with you?

A. I don't think we discussed the buzzers. We just discussed the apartments.

[61]

Q. Well, you knew that the first and second floors were one duplex apartment, is that correct?

A. Right.

Q. Did you know what name was associated with anyone on the first and second floors?

A. Yes.

Q. What was the name?

A. The one I was told that Tina Berger had those apartments.

Q. Well, was her name on the door, on the buzzer, next to the buzzer?

A. I don't think so.

Q. Looking at Plaintiff's 7, the last one we just did, there are a bunch of names there. Where did you get those names? Evadne Baker, who is that?

A. She's the owner of the property.

Q. Who is Margarita Maria Zavalia Bunge?

A. They're a joint owner.

Q. Who is Tina Berger?

A. That was the name of the person who we believed was operating the house of prostitution.

[62]

Q. So you prepared this summons. It says filed in the office of the Clerk of the Court on June 24th. Did you file the summons and complaint before you went in for the order to show cause?

A. No.

Q. It says filed on June 24th. Was it in fact filed on June 24th?

A. It was—yeah, it's filed the day before we actually see if we get the closing or not.

Q. But this was one of the documents you brought to the Judge, is that correct?

A. Correct.

Q. Turning to June 25th or the day you got the order, whenever that was, after you got the papers, what did you do?

A. When I picked the papers up from Court?

Q. Right.

A. I went back to the office, my office. I informed everybody that we got the closing order and that we were going to close it that evening.

Q. That evening?

[63]

A. Well, later in the day, I should say.

Q. And what steps do you take in order to actually close it?

A. At what point?

Q. Well, you told them that we're going to close it. Now what happens? Do they know what to do or do you give them instructions or what happens?

A. They know what to do. The legal end makes the copies of all the papers. There is somebody that also does mail service so everything gets prepared. The police officers prepare the equipment that they need.

Q. Now, are these officers assigned to the Mayor's office for midtown enforcement, or are they regular police officers?

A. They're NYPD assigned to the Mayor's office.

Q. How many officers are assigned to the Mayor's office?

A. At that time there were two.

Q. Two. So you just gave them the papers and what, told them; "Go to it, you know what to do?" How did that work?

[64]

A. No, once everything is prepared, legal goes with them, and we go to the location and execute it.

Q. Were you with them that night?

A. I was there, yes.

Q. Tell us exactly what you did.

A. What I did?

Q. Yes.

A. At what point?

Q. I mean, you go there to execute the closing.

A. Right.

Q. Tell us the steps you did to actually engage in the closing.

A. We first meet at a precinct. Usually we meet with vice and we meet with, in this case they came along with us, as well as officers in the precinct because of the size of the location, and we got to the location, the police went to the door, they first try getting in by pressing the buzzers. Somebody did buzz back. They went in first. When the police went in, I went in after.

The police, some went into the apartments on the first floor, some went to the

[65]

second, more went to the third. I went in first to the first floor. There were about approximately five women there with security, like a bouncer. When everybody was settled in that apartment—

Q. What did you do, just very briefly, what did you do with them?

A. Well, everybody was told to sit down in the living area. They were sitting on the couches. Just to basically get control. The first one who was—the police, they also took the security and brought him over there. They checked for weapons.

When everybody was under control over there, I went out, I went to the second floor.

Q. Did you tell them to leave or vacate?

A. Not at that point. Eventually. Up at the second floor, there was another door, like, that was the only door there, and when you go in there, it turns out that it is a duplex part that

leads out on to a balcony of the first floor. There were women in bedrooms on that floor, and I believe that there were customers there also.

When everybody was taken out of there

[66]

and brought downstairs, I went up to the third floor. The apartments, well, 3W, there was, I don't believe that there was anybody in 3W at the time.

Q. Did you go into 3W?

A. Yes. I went to 3W.

Q. Did you go into 3W first?

A. No, what happened was, when I got up to the top of the steps, the first apartment that—the first door is 3E. That's right at the top of the steps. But the officers, some had gone to 3W, some had gone to 3E. The ones from 3W I believe had said that there was nobody in there. When the door was open to 3E, I had gone in. I saw that the place looked like an apartment that somebody was living in.

I stopped everybody. I took, I believe, two officers. We took an inventory of the apartment. First we went through the apartment to see if there was anybody in there. There was nobody in there. At that point, I think I went back downstairs to the first floor.

Q. Did you ever go to 3W?

A. Yeah, I went to 3W also.

[67]

Q. Well, did you notice that 3E and 3W were not connected at that point?

A. Yes.

Q. Did you take any steps, having realized that 3E and 3W were not connected?

A. Yes.

Q. What steps did you take?

A. Well, I stopped anybody else from entering into 3E. I had gone back downstairs, and I asked, I basically made an announcement there for the girls that were there, I asked them if they knew whose apartment that was there in 3E. At that point nobody said anything, and when we started releasing everybody, after everybody, all the, everything was secured, we weren't looking to make any arrests, we started releasing them, one of the girls as she was leaving came over to one of my officers and said that she wanted to say something.

He called me over, but she didn't want to be seen, she said, so we went behind the wall, and she told, she told us that—I asked that question, who belongs to 3E, and she said she believed that it belonged to Tina Berger also, and

[68]

I saw the name Devon Walsh in the apartment. There was a letter or something that was laying on a counter, and I asked if she knew who Devon Walsh was, and she said no, but she believes that apartment belonged to Tina Berger who had the lease for all those apartments.

I asked her if they were working out of that apartment, too, and she said she believed that they were. I asked how she would know, and she told me that—this particular girl had the key, she was like the manager at that time, that evening, for the place, and she told me that she believed that they were working out of that apartment, too.

Q. Do you know which girl said this to you?

A. I don't remember her name.

Q. You say one of the women in there said that they were working out of 3E?

A. Yes, that they weren't—not that evening, but that they were working out of that apartment. I asked her about the other, there was one more floor. She said that she believed that there was an apartment on that floor, too, but she

[69]

knows that the third floor was operating and they were operating out of that apartment. Not she herself, but that they used it, and it belonged to Tina.

Q. And you don't know which one of the women said that?

A. I remember her look a little bit, but I don't remember her name.

Q. Did you make any notes of that conversation?

A. No.

Q. Did you ever report this to anybody else?

A. At that point I'm sure I spoke to vice at some point afterwards. And I don't—that was it on that, and then we took steps to secure the apartment.

Q. So, I mean, when you went up to 3W the first time, or 3E the first time, you saw it was not connected, is that correct?

A. Correct.

Q. Did you at that point say maybe I made a mistake and we shouldn't secure this apartment?

[70]

A. That we shouldn't—

Q. That you should not secure the apartment. Did you say that to anybody?

A. I said that the apartment looks like somebody lives there.

Q. All right. And you saw something named Devon Walsh.

A. Yes.

Q. And you saw that it was not connected to 3W, isn't that correct?

A. Right, there was no way to enter from one to another.

Q. Even though the officer had told you that.

A. Correct.

Q. At that point, did you have some doubt whether 3E was being used for houses of prostitution?

A. Yes, I had a doubt.

Q. And what happened thereafter? What alleviated, if anything, what alleviated that doubt?

A. What alleviated?

Q. In other words, did that doubt ever

[71]

disappear?

Mr. Siegel, wasn't it possible at that point to say, "I made a mistake, let's leave 3E alone, and let's not—" because you took certain steps in 3E, isn't that correct?

A. Yes, it seemed to me that they weren't working out of that apartment, but I couldn't say for sure that the person who had that apartment wasn't part of the operation.

Q. Well, doesn't probable cause require you to have evidence that it is being used for illegal purposes?

A. Right, I had no evidence of that.

Q. Now, after you went into 3E—you told me officers had already been in there.

A. They opened the door. When they first opened the door, they just went in quickly just to see if there was anybody in there. Once there was nobody there, they went back to the door and I had gotten up there, and I didn't let anybody else into the apartment, but I had gone in with the two officers from the Mayor's office, and at that point, that's when we took an inventory, and then we had to seal it up, to secure it.

[72]

Q. You say "we had to." Why did you have to?

A. Well, the door was open.

Q. Did you put a sign there in addition?

A. The sign had to go up, and the—

Q. Why did the sign have to go up?

A. Had to go according to what the order said. That's what the Judge ordered and we had to fulfill it, and if anything had to be corrected, it would have to be done the next day.

Q. So your position was that even when you went in there and saw that the officer was incorrect, and it was not connected, and even though there was no evidence that it was being used for prostitution, you still thought that you were obliged under the order to treat it as if it was being used for prostitution?

A. No. It was only while there was nobody there. Later on, when I met Miss Walsh, that's when I ordered the opening of the apartment.

Q. Well, let me see—let's take this one step at a time. At what point did you have this conversation with this, the woman who called you

[73]

over and said, "I thought Tina Berger was using it," or whatever, words to that effect.

A. Once I left the third floor, I had gone back down. I asked if anybody knew who Devon Walsh was and who had access to that apartment. And then as we were releasing them, we let them go one at a time. When it was that one's time to go, when she got near the door, one of my officers who was standing near the door, she told me she wanted to say something, and then he called me over.

Q. And then she told you this story that you just—

A. Yes.

Q. That she thought Tina Berger had that apartment and was using it?

A. Had that too, yes.

Q. Did you take any action as a result of that conversation?

A. No, I just went back upstairs and wanted to make sure that the apartment was locked until we could find out who Devon Walsh is, was, and what we were going to do.

Q. Were there signs or something put on the apartment, posted on the apartment at that

[74]

point?

A. Yeah, once it was locked, there was a sign that was placed on it.

Q. And who put that sign on there?

A. Somebody from my office.

Q. Did they do it pursuant to your directions?

A. Yes.

Q. How long were you there to secure the apartment?

A. I was there, that night, I was there for several hours. Eventually, when—well, that one was locked first, then we did the other apartments, and it was already the evening, it was like ten, eleven o'clock at night, then we left.

Q. And when did you start? Do you know? Five, six? Do you know what time it was?

A. Yes, probably around six or so.

Q. After you left, what happened?

A. If I recall, it was about 11:00 or so. My phone number is on the papers. I'm not sure if we left—I don't think we left a note on there. I started— I went straight home from there, I was driving. One of my officers had gone

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back to the office and I had gotten a beep while I was driving home that he had gotten a call from someone named Devon Walsh, and that she's at the building at that time.

I was in lower Manhattan, I turned around and said that we would meet at the location, and I got there within fifteen minutes, and my officer arrived. I saw Devon Walsh sitting on the front step of the building and she was reading the papers.

Q. And what did you say to her and what did she say to you?

A. I introduced myself. She asked what happened that night. I told her.

Q. Did she say, "Why did you pick on my apartment?" Did she ask you that at any point?

A. I don't remember what she actually asked. I mean, I just told her what went on, and that—I think I told her that

we had information that her apartment was involved. We asked her who she was, and we asked, I believe we asked for ID, and once we established that she belonged to that apartment, then we just engaged in just casual conversation in general, and she said that—we

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walked her back to her apartment, and she had mentioned that she had a cat, and we told her that we were going to open the door, let her go in, we didn't see a cat, but let her go in, if there's a cat there, do whatever you have to do, but after talking to her for a while, I decided that I was going to let her stay in the apartment and—we just had a nice casual conversation, really, for a while.

We had to then lock the door. She said she would have gone to sleep in her boyfriend's house, if need be. I said "You can stay over here, it will be okay."

We took the sign off the door, we called the super of the building, who I found out earlier lived and worked in a building across the street. So actually, I had her call him and he came over and we asked him to try to fix the lock and make sure the door locked, which he did.

I gave her my beeper number, I told her if anything happens that night, if she, for whatever reason she has to get in touch with me, she could.

As well, I told her that I was going

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to notify the precinct, the precinct commander, that, to have a patrol car ride by every so often, just to keep a watch there. I said there was somebody that was going to be staying in the building that night, and if you see her, she's okay, she's allowed to be there, and if you see anybody else, no one else is supposed to be there, and just watch for her safety.

Q. Were there apartments on the fourth floor?

A. There were, but there was nobody up there.

I spoke to the captain, he told me that he was going to do that. And then so once we secured her inside, I had gotten home, around, I don't know, maybe 12:30 or so, and I got a beep from her, and she told me that she heard noises inside the building, and I asked her was there anybody else upstairs, I mean, who belongs there. She said no, but she said she heard some people on her floor going into 3W.

I said, "How do you know they're going into 3W?"

She said, "Because I looked out the

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door."

Which I felt was a little strange, because you have to open the door and look out to see 3W. She told me she saw some people, the chain was missing from the door. She saw people over there.

I called the precinct, I said, "Get a car over there right away." A patrol car went, they called me back, they told me that the chain was secure, there's no evidence of anybody going in there. They spoke to her, and they said any other problem, just give us a call.

And then I know she called me the next day, we spoke several times, and we were talking about her door, what to do with her door. And I told her that I was going to try through the Police Department to get her a replacement door, there's a unit that takes care of that. We were just in contact quite a bit. Sometimes she just called me just to talk. She had gone out to the Hamptons, she was working out there. She would call me from work and just, you know, "How are you doing."

Q. This is in the next two or three

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days?

A. Yes. A lot of the conversation was just casual conversation, and as well, I was working on trying to get her a door through the Police Department. I didn't have any authority to do anything. I just couldn't recommend that they actually request that they get one and the captain of vice was reaching out to try to get one.

And that's basically what happened.

MR. FRIEDMAN: Let's mark this as 8.

(Plaintiff's Exhibit 8 was so marked for identification.)

Q. Showing you what's been marked as Plaintiff's 8. Can you identify this?

A. Yes, the consent agreement to have apartment 3E dismissed from the case.

Q. Did you prepare this?

A. Yes.

Q. How did you get the various signatures? Who is Margarita Maria Zavalia Bunge?

A. That's the landlord.

Q. How did you get her to sign that?

A. I told Devon Walsh, actually the night after we let her back into the apartment

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that I was going to prepare a document like this, and everything would be all right from that point on.

We went through—I'm not sure if Margarita signed this at the courthouse—I believe it was at the courthouse that she signed it.

Q. Well where did Devon Walsh sign it?

A. Devon Walsh showed up at court that day when Margarita was there.

Q. Was she in the courtroom?

A. No, we met actually—I didn't know that she was coming. I knew Margarita was there. We went into one of the conference rooms, and as I was talking to Margarita, Devon came, and, I don't know, the strange thing was, at that point they looked like they were best friends. Then they would walk away from each other and each one would come to me and badmouth the other one.

The whole thing seemed strange to me, but we got this signed, and then I had it submitted to the Judge.

Q. Well, do you have any evidence of any kind that Devon Walsh was engaged in prostitution?

A. No.

[81]

Q. Now, you mentioned that you had a conversation with officer 28564 about some confusion whether the apartments were connected or not. I think you told us that—when did that happen?

A. Well, actually, I had spoken to the captain who was the commander of vice the following day, actually, and that officer was standing next to him. I know that because I heard his voice, and I know he called his name.

I spoke to the captain, the captain asked me what happened. I told him what happened, why we got that apartment. He asked the officer, I was able to hear, he asked the officer, and

the officer told me that—told the captain that he made a mistake.

Q. Well, did you ever have any direct conversations with the officer?

A. I don't recall specifically. It may have been the night that we went to the location.

Q. Was he also part of the raiding party?

A. I really don't remember. But after that night, I don't really recall if I did speak

[82]

to him directly or not. That I don't really remember.

Q. But your recollection is that this information was passed on by the captain? Is that correct?

A. Yes, I mean, the captain was holding the phone while he was talking to me and the officer was right next to him. So I heard what the captain asked him and I heard what the officer responded.

Q. And you heard it on the telephone?

A. Yes.

Q. Again, what did the officer say?

A. Well, the captain said to him that I said that the apartments weren't joined, and it was the information that I got from the officer, and the captain said to him that he said that he got that information from you that it was joined. He also said, "Yes, I told him that, but I must have made a mistake."

Q. Did he say anything else, other than "I must have made a mistake?"

A. No.

Q. I thought you mentioned that there

[83]

was a lot of confusion, or something to that effect.

A. Well, that was in talks when I was speaking with the captain, not directly with the officer.

Q. But the only thing you remember the officer saying is "I must have made a mistake?"

A. Yes.

Q. After this order of June 30th, did you ever have any other conversations with Devon Walsh?

A. I'm trying to see when June 30th was, if that was the return date or not.

Q. Well, that's the date on the order. That's the date it was signed.

A. That I think was the return date. I spoke to her numerous times. I don't remember if I spoke to her after that time or not, and at that time she wasn't represented by an attorney. But I spoke to her numerous times, she called me.

Q. And what was the gist of the conversations?

A. Well, the first few conversations after that evening was what I was going to do and

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what I was trying to do with the door, and she would talk to me. She had mentioned to me also, I think it was the night it happened, she told me she was under a psychiatrist's care, and she just had a conversation telling me about her life, who she works for, what she does. I think she mentioned family.

She would call me from the Hamptons, "Yeah, I'm out here now, I'm coming back this date."

Q. About how many conversations did you have after the incident?

A. At least five.

Q. Did you ever explain to her how the mistake occurred?

A. I believe I told her that—well, I told her that this is what was going on in the building, and this is the information that I got, that this apartment, that it was occurring in this apartment, too.

Q. That it was occurring in this apartment? I mean, what was, on what was that statement based?

A. That there was prostitution on—yes.

[85]

Q. But it was not in that apartment, but in 3W, which you thought was connected.

A. Which was—right.

Q. Did you ever tell her that?

A. Well, I did tell her that I had no evidence of any illegal activity going on in her apartment, and after speaking with her, after telling her that, that's when I let her back in that night.

Q. But did you ever tell her that the reason her apartment was targeted was because you believed it was connected to 3W?

A. I believe so.

Q. You think you did say that to her?

A. I told her that that was the information I got, that the apartments were connected.

Q. Thereafter, was there any—did you engage in other closing activities, closing a house of prostitution, massage parlors and the like?

A. Oh, yes.

Q. Was there any other occasion where a mistake occurred?

[86]

A. Not on any of them that I did.

Q. Did you ask the police to review the documents after they signed them?

A. Which documents?

Q. In order, did the police, for example, review your affidavit?

A. I don't believe so.

Q. In other words, you prepared the affidavits for the police and presumably they read it for accuracy, is that correct?

A. Well, the affidavits that—

Q. That the police signed.

A. For their specific—yes.

Q. Then you prepared your affidavit?

A. Correct.

Q. And it was reviewed by Virginia Sullivan.

A. Yes.

Q. And also reviewed by someone in Corp Counsel?

A. Correct.

Q. Anyone else review those?

A. No, not to my knowledge.

Q. Was an investigation made by your

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office of this incident?

A. An investigation?

Q. Inspector general or Virginia, did she ask you "I'd like a written report about what happened here."

A. I'm not sure if I typed up something for my director. I don't remember if I did or if I didn't. But nothing for any other agency.

Q. Did you make a report to Corp Counsel, for example? Not in connection with this litigation, but immediately thereafter the incident occurred.

A. Not a written report. Maybe verbally mentioned it. That I don't remember, but not written.

Q. Do you recall discussing—did you tell Virginia Sullivan what happened?

A. Oh, yes.

Q. You say you didn't make a written—did she ask you for a written report?

A. Not to her, no.

Q. Well, to anybody.

A. I don't remember. If anything, like I said, maybe to my director. I don't remember if

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I did or not, but definitely to nobody else.

** MR. FRIEDMAN: Well, if there was such a report, I'll put that in my request for documents.

MS. MIRABILE: Take that under advisement.

MR. FRIEDMAN: Yes. Let me take a break and I may just have a few more questions.

(Brief recess.)

MR. FRIEDMAN: I have no further questions.

(Time noted: 5:10 p.m.)

Subscribed and sworn to
before me this _____ day
of _____, 2000.

_____

Notary Public

CERTIFICATION

I, LINDA FISHER, a Certified Shorthand Reporter, Certified Realtime Reporter and Notary Public, within and for the State of New York, do hereby certify:

That LEE S. SIEGEL, the witness whose examination is hereinbefore set forth, was first duly affirmed by me, and that transcript of said testimony is a true record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8 day of May 2000.

/s/ Linda Fisher

LINDA FISHER, CSR, CRR

Exhibit C to Friedman Declaration -
Deposition of Sgt. Jagdeshwar Jaskaran

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVON WALSH,

Plaintiff,

vs. 99 CV 4586

THE CITY OF NEW YORK and
LEE S. SIEGEL,

Defendants.

DEPOSITION OF JAGDESHWAR JASKARAN, a Witness herein, taken by Plaintiff, pursuant to Notice, at the offices of Corporation Counsel, 100 Church Street, New York, New York, on Tuesday, June 6, 2000, at 12:25 p.m., before Margaret Eustace, a Shorthand Reporter and notary public, within and for the State of New York.

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New York, New York 10007

BY: CATHERINE MIRABILE, ESQ.

ALSO PRESENT: MARIA ROCCO

* * *

IT IS HEREBY STIPULATED AND AGREED that all objections, except as to the form of the questions, shall be reserved to the time of the trial;

IT IS FURTHER STIPULATED AND AGREED that the within examination may be subscribed and sworn to before any notary public with the same force and effect as though subscribed and sworn to before this court.

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WALTER W. THOMPSON,

having been first duly sworn, was examined and testified as follows:

(Plaintiff's Exhibit Nos. 9 and 10 were so marked for identification.)

Whereupon,

JAGDESHWAR JASKARAN,

having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. FRIEDMAN:

Q. Sergeant Jaskaran, are you still undercover?

A. No, sir.

Q. Could you state your full name for the record.

A. Jagdeshwar Jaskaran.

Q. Sergeant Jaskaran, were you involved in an arrest at 332 East 22nd Street last June?

A. Yes.

MR. FRIEDMAN: I have marked this as Exhibit 9, which is a continuation from our last deposition.

MS. MIRABILE: Yes.

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Q. I just ask you to read it.

Are you undercover police officer 28564?

A. Yes.

Q. Did you sign this affidavit?

A. Yes, I did.

Q. Could you tell us where you signed it, or the circumstances under which it was signed?

A. I met with Corporation Counsel, Mr. Levy.

Q. Mr. Siegel?

A. Lee Siegel, yes, I'm sorry.

And I signed — if I could remember, I signed it in his office, sir.

Q. How long did the whole process take from the time you sat down until the time you left?

A. I don't remember, sir.

Q. Was it less than an hour or over an hour?

A. I couldn't tell you, I don't remember.

Q. Had you spoken to him before you went over there to sign this affidavit?

A. I don't believe I did.

Q. Could you describe the process by which the affidavit was done. Did he write it down in hand or was he typing while you spoke into a machine?

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Just describe how the affidavit came to be prepared?

A. I don't remember how this affidavit came to be prepared, sir.

Q. But you remember you did speak to him, you did tell him what happened; is that correct?

A. That's correct, sir.

Q. And June 18th is the date on the affidavit; is that correct?

A. That's correct, sir.

Q. And I think you just said you had not spoken to him before that date?

A. I don't believe I did.

Regarding this?

Q. Regarding this incident.

A. I don't believe I did, I am not sure.

Q. How did you know to go over to his office to have the affidavit prepared?

A. I don't remember that, I'm sorry.

Q. Now, as far as the incident itself is concerned, this affidavit describes the fact that you went to 332 East 22nd Street and pretended that you wanted to buy sex; is that correct?

A. That's correct, sir.

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Q. And you went up to — take a look at paragraph 5. Paragraph 5 says you pressed the button for 3W. Do you remember what the third floor looked like?

A. No.

Q. Do you remember whether there were two apartments on the third floor?

A. No, I don't.

Q. I think this is going to be a very quick deposition, but that's all right.

Looking at what is described at paragraph 5, do you recall making an offer for sex?

A. Yes, I do.

Q. With a woman named Melissa Sallas?

A. I don't remember her name but I remember what she looked like.

Q. Do you remember the room into which you went?

A. Yes, I do.

Q. What did the room look like?

A. It was a small apartment, one of the distinctive things about it was it had a kitchen area with, I believe, a counter stand. I am not

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positive, but in the kitchen area there was a counter stand where you put the money. That was distinctive. Then as you walked in, there was a mattress there. I can't remember much more.

Q. Do you remember any doors?

A. Yes, I do.

Q. Describe those.

A. Besides the door where you walked into the apartment, as you walked in the front area, there was a little counter, and as you walked down, I believe there is a bathroom as you are walking away from the front door to the left, because that's where he shooed me away to. And I believe there is another door there. I am not positive.

Q. That's all you recall?

A. That's all.

Q. So it is basically a one-room apartment with a kitchen area and bathroom?

A. I am not sure if it is one room but from what I remember it was an small apartment.

Q. Now looking at paragraph 8, the very last sentence, and this is in your words, "I have no doubt that the first, second and third floors of 332 East 22nd Street are being operated as a house of

[10]

prostitution."

What made you believe the entire third floor was being used for prostitution?

A. When I was in that apartment, I believe that entire floor was probably one apartment.

Q. What made you think that?

A. That door that I remembered, I believe I thought the door was connected, I guess, how do you say it, perhaps like a suite like you walk in through the door into other rooms.

Q. But you didn't see the other side of the door?

A. I don't believe I did.

Q. It was just a door?

A. Correct.

Q. So you didn't know where that door led to?

A. I assume it led to other rooms.

Q. Why did you assume?

A. I don't remember how everything looked but at the time that I was there I had a feeling that that door went into the other rooms.

Q. Do you recall what you told Mr. Siegel?

A. I told Mr. Siegel that I wasn't 100

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percent sure but I believed that door went into other rooms on that floor.

Q. On what basis did you tell Mr. Siegel that?

A. I don't remember.

Q. But it was a closed door. Couldn't it have led to a closet or something like that?

A. For whatever reason, I didn't believe it did.

Q. But it just was a door?

A. But because of the make up of the room — I am just saying I don't exactly remember how the floor was laid out, but the way the door was situated and the way the floor was, I believe that door went into other rooms on that floor.

Q. Would that necessarily mean it is connected to other apartments on that floor?

MS. MIRABILE: Objection to the form. You can answer.

A. I am not sure. I knew there was another apartment there, I believed it was one complete floor.

Q. I have marked this as Plaintiff's Exhibit 10. Take a look at page 38, if you will. And this

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was pages from the deposition of Mr. Siegel.

The question at the bottom of page 38.

"Did you have any evidence," and I am asking Mr. Siegel, "whatsoever that apartment 3E was being used for the purposes of prostitution?"

Answer: "That's what the officer told me. He told me that the two apartments were connected."

Did you tell Mr. Siegel that?

A. I don't remember telling him. I don't remember if I told him that, sir.

Q. Next question: "Did you try to verify that in any way?"

Answer: "I remember asking him the day that he gave me the information twice. I remember getting a diagram made by the officer of what the layout looked like and based on that —"

Do you recall making a diagram for Mr. Siegel?

A. I may have, I don't remember making that.

Q. Do you remember giving him the information twice that it was one connected apartment?

A. I don't remember that either, sir.

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Q. When you say you don't remember, you don't remember you did, you don't remember you didn't, you just don't remember?

A. I don't remember.

Q. Do you recall getting a phone call from Mr. Siegel — do you know happened after this affidavit was signed?

A. Exactly what happened afterwards?

Q. In other words, do you know what the affidavit was for? Why were you signing this affidavit?

A. I believe they wanted to stop prostitution in the building.

Q. How would they do that?

A. I believe they wanted a temporary restraining order against the business and the prostitution business in the building.

Q. Do you know whether that happened?

A. I don't remember.

Q. Did you take part in serving the temporary retraining order?

A. I remember going back. It is two years ago, not that that's an excuse, I remember going back in an enforcement capacity, undercover

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capacity, but I don't remember if it was in relationship to this or not.

Q. Was it at about the same time in June?

A. About the same time, yes.

Q. What do you mean by an enforcement capacity?

A. They were enforcing a search warrant perhaps or a restraining order, I am not sure.

Q. Were you there with Mr. Siegel when you went back?

A. I don't know if he was there.

Q. What do you remember doing when you came back that second time?

A. I remember being only on, I believe, the first and second floor. It is weird. It is tall — I don't know how to describe it, I remember being on the first or second floor.

Q. You never got up to the third floor?

A. I don't remember if I did.

Q. Were you there to arrest somebody or to see if they violated some order? What were the circumstances?

A. I don't remember the circumstances, sir. I remember being there in an enforcement capacity

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because I had a raid jacket and gear on.

Q. Taking a look further on that page, on page 41. I'm sorry, take a look at page 41, line 17.

"Did you ask the officer any questions about apartment 3E?"

Answer: "Yes."

Question: "What did you ask him?"

Answer: "I asked him what was on the third floor, and he told me that there were two doors and it seemed to be one apartment."

Did you tell Mr. Siegel that?

A. I remember telling Mr. Siegel that I believed that door went into other rooms. I believe it was one floor, I can't remember specifically telling him that.

Q. "I asked specifically, are there two apartments connected and he told me yes."

Do you remember saying that?

A. I don't remember.

Q. "Did he say on what basis did he make that judgment?"

Answer: "Well, he was the officer in the apartment, from what he remembered, he thought there

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was a way to get from one apartment to another and that it was just two doors for one apartment."

Do you remember saying that?

A. No, sir.

Q. You didn't say that or don't remember?

A. I don't remember.

Q. Take a look at page 43, there are a couple of more questions about that. Starting on line 17:

"I asked him if that door was part of the same apartment or if there were two separate apartments, and he said that the two apartments were actually connected."

Do you remember saying that?

A. No, sir.

Q. "Did you ask him on what basis did he make that statement?"

Answer: "He told me he saw a way that it adjoined."

Do you remember making that statement?

A. No, I don't.

Q. Next question: "Did you ask him any other questions about that? At what point did you ask him to draw picture?"

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Answer: "I think I asked where the two apartments joined and he told me that it was as you entered to the right."

Do you remember saying that to Mr. Siegel?

A. No, sir.

Q. Now, again, looking at this exhibit, do you recall having a telephone conversation with Mr. Siegel shortly after the temporary retraining order was served?

A. No, sir.

Q. Take a look at page 51, again starting line 10:

Question: "When he's in 3W, what kind of observation could he have made or did he tell you he made to show it was connected to 3E?"

Answer: "He told me there was a hole, not a man made hole, just a hole in the wall, but like walking from one room to another."

Do you recall saying that to Mr. Siegel?

A. No, sir.

Q. Did you see a hole?

A. I don't remember seeing a hole.

Q. You saw a door?

[18]

A. Yes.

Q. A closed door?

A. Yes, I did.

Q. But would that necessarily show it connected to 3E?

A. No.

Q. "He told me that they were definitely connected."

Did you tell him that they were definitely connected?

A. No.

Q. "Did you ask him any questions about that? On what basis did he come to that conclusion?"

Answer: "He told me he saw into the other area."

Did you tell him that you saw into the other area?

A. I don't remember if I told him that or not.

Q. Again page 52:

"He told me he looked in, he saw in, and that they were connected. That it was the one apartment because the two apartments joined like

[19]

this." Making an angle with the hands.

Do you recall telling him that?

A. No, sir.

Q. Did you tell him that?

A. I don't recall telling him that, sir.

Q. Now, at the bottom of the page, again, you can read the rest.

"When you," Mr. Siegel, "went into 3E, did you see any connection of that kind?"

Answer: "No."

Question: "How do you explain the fact that he," allegedly you, "said there was a connection?"

Answer: "When I asked him afterwards, he told me that it happened quite fast from the time he had gone into the apartment and that he was concentrating on making the deal."

Do you recall saying that to Mr. Siegel.

A. No, sir, I don't.

Q. Do you recall talking to him afterwards?

A. No.

Q. Do you recall saying that you had made a mistake?

A. No, I don't.

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Q. Do you recall saying your bearings were off?

A. No, sir.

Q. Just to go over this once again:

"When I asked him afterwards, he told me that it happened quite fast from the time he had gone into the apartment and that he was concentrating on making the deal. Not too long after the other officers came up, there was a lot of excitement, that other women had come up also and that he had made a mistake and that his bearings were off."

Do you recall making any of those statements?

MS. MIRABILE: Objection to the form. You are not reading it accurately as stated in there.

MR. FRIEDMAN: Okay,.

Q. Sergeant Jaskaran, I want you to read exactly from line 21 on page 52 to line 4 on page 53.

Do you recall making any of those statements to Mr. Siegel?

A. No, sir, I don't.

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Q. Take a look at page 81, and it refers to, I asked Mr. Siegel, "You mentioned you had a conversation with officer 28564."

You are officer 28564; is that correct?

A. Yes, sir.

Q. And Mr. Siegel says, "Well, actually I had spoken to the captain who was commander of vice the following day and that officer actually — and that officer was standing next to him. I know that because I heard his voice and I know he called his name."

Do you recall that the commander of vice, whoever that is, had a conversation with Mr. Siegel and spoke to you about that?

A. No, sir.

Q. "I spoke to the captain. The captain asked me what happened, I told him what happened, why we got the apartment. He asked the officer, I was able to hear, he asked the officer and the officer told me that — told the captain that he made a mistake."

Do you recall that incident happening?

A. No, sir.

Q. Do you know where you were the following

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day, this is June 20 — let me see if I can remember.

MS. MIRABILE: I think it is the 26th, the following day.

MR. FRIEDMAN: The 25th was the day.

Q. Do you know where you were? I know this is a long time ago but do you recall where you were on June 26, 1998?

A. No, sir.

Q. Would you have been in the same place as the vice commander?

A. The vice commander had a separate office from us, unless I was called into his office, I don't believe I was, I would be in the same proximity.

Q. Do you remember at any time during June 26th standing next to the commander of vice while he was having a conversation with Mr. Siegel?

A. No, sir.

Q. Do you recall having a conversation with anyone after the incident about your affidavit?

A. No.

Q. Did any other officer ask you about this affidavit?

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A. No, sir, not that I can remember.

Q. Did Mr. Siegel ask you, after the incident, after June 25th, anything about your affidavit?

A. I can't remember if he did or didn't.

Q. Any other member of the Corporation Counsel's office, aside from this lawsuit, do you recall any conversation whatsoever?

A. No, sir.

Q. Again, look at page 82, starting at line 7, "The captain was holding the phone while he was talking to me, the officer was right next to him. I heard what the captain asked him. I heard what the officer responded."

Question: "You heard it on the telephone?"

Answer: "Yes."

Question: "What did the officer say?" That's you.

Answer: "Well, the captain said to him that I said that the apartments weren't joined, and it was information that I got from the officer, and the captain said to him that he said that he got the information from you that it was joined. He also

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said, yes, I told him that but I must have made a mistake."

Do you recall making that statement?

A. No, sir, I don't.

Q. Did you make that statement?

A. I don't recall if I did, sir.

Q. That's all I have.

(Time noted: 12:55 p.m.)

Subscribed and sworn to
before me this _____ day
of _____, 2000.

Notary Public

CERTIFICATION

I, MARGARET EUSTACE, a Shorthand Reporter and notary public, within and for the State of New York, do hereby certify:

That JAGDESHWAR JASKARAN, the witness whose examination is hereinbefore set forth, was first duly sworn by me, and that transcript of said testimony is a true record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 13 day of June, 2000.

/s/ Margaret Eustace,

MARGARET EUSTACE,
Shorthand Reporter

**Exhibit G to Friedman Declaration -
Affirmation of Defendant Lee Siegel,
dated June 23, 1998**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EXHIBIT
Plfs 2
ID-5/3/00 lt

Index No.

THE CITY OF NEW YORK, and THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE CITY OF NEW YORK,

Plaintiffs,

– against –

EVADNE BAKER (A/K/A EVADNE ARCHAMBAULT), MARGARITA MARIA ZAVALIA BUNGE, TINA BERGER, THE LAND AND BUILDING KNOWN AS 332 EAST 22nd STREET, BLOCK 927, LOT 37, County, City and State of New York, "JOHN DOE" and "JANE DOE," fictitiously named parties, true names unknown, the parties intended being the owners, lessees, operators or occupants of the establishment doing business as "FOREVER YOURS" located on the first, second and third floors at 332 East 22nd Street, New York, New York, and any person claiming any right, title or interest in the real property which is the subject of this action,

Defendants.

AFFIRMATION

LEE S. SIEGEL, an attorney admitted to practice before the courts of this state, affirms the truth of the following under the penalties of perjury pursuant to Rule 2106 of the Civil Practice Law and Rules:

1. I am an Assistant Counsel in the Mayor's Office of Midtown Enforcement and of counsel to Michael D. Hess, Corporation Counsel of the City of New York.

2. I submit this affirmation in support of the plaintiffs' motion for a temporary restraining order and preliminary injunction restraining defendants during the pendency of this action from using and occupying the real property which is the subject of this action as a house of prostitution. This application is made pursuant to sections 7-707, 7-710, and 7-711 of the Administrative Code of the City of New York, sections 2321(4), 2321(5) and 2323(1) of the New York Public Health Law, and sections 6301, 6311 and 6313 of the CPLR. Plaintiff City of New York is also seeking a closing order for the first, second and third floors of the building, pursuant to sections 7-707, 7-709 and 7-711 of the Administrative Code, to enforce such injunctive relief.

3. The premises which are the subject of this action are located on the first, second and third floors of the building located at 332 East 22nd Street, New York, New York (the "subject premises"). This application is predicated upon the fact that the subject premises are being operated under the name FOREVER YOURS as a house of prostitution where acts of prostitution are performed in violation of the New York Penal Law, the New York Administrative Code, and the New York Public Health Law.

4. Defendant EVADNE BAKER (A/K/A EVADNE ARCHAMBAULT) is an owner of record of the subject premises.

5. Defendant MARGARITA MARIA ZAVALIA BUNGE is an owner and managing agent of record of the subject premises.

6. Defendant TINA BERGER is an owner, operator, occupant, employee, and/or lessee of the subject premises who conducts business therein under the name FOREVER YOURS.

7. Defendants "JOHN DOE" and "JANE DOE" are fictitiously named parties, diligent investigation having failed to disclose their true names, the parties intended being any person or entity that is an owner, lessee, operator or occupant of

the subject premises, and any other person claiming any right, title or interest in the real property which is the subject of this action.

8. The defendants' operation of a house of prostitution is a public nuisance under the criteria of the Nuisance Abatement Law, section 7-701 *et seq.* of the Administrative Code and under section 2320 of the Public Health Law. The existence of this public nuisance and the plaintiffs' right to a preliminary injunction and closing order will be demonstrated below by clear and convincing evidence.

II. THE NUISANCE ABATEMENT LAW AND THE NEW YORK PUBLIC HEALTH LAW

9. In 1977, the City Council enacted the Nuisance Abatement Law (since renumbered as sections 7-701 *et seq.* of the Administrative Code, a copy of which is annexed as Exhibit "A"), finding that:

> the use of so-called massage parlors and other premises for purposes of lewdness, assignation or prostitution, constitutes a debasement and distortion of sensitive human relationships central to family life, community welfare and the development of human personality, is indecent and offensive to the senses and to public morals and that such exploitation and flagrant violations of the building code, health laws, zoning resolutions [and] licensing laws . . . all interfere with the interest of the public in the quality of life and total community environment, the tone of commerce in the city, property values and the public safety; the council further finds that the continued occurrence of such activities and violations is detrimental to the health, safety, morals and general welfare of the people of the City of New York and of the businesses and visitors thereof.

Admin Code section 7-701 (Former section C16-2.0 of the Administrative Code, Local Law 55/1977, since amended and renumbered as section 7-701).

10. In strengthening and broadening the Nuisance Abatement Law in 1983, the Council reaffirmed its finding of public nuisances involving:

> the operation of certain commercial establishments . . . in flagrant violation of the building code, zoning resolution, . . . penal laws regulating . . . prostitution and related conduct [and] licensing laws . . . all of which interfere with the interest of the public in the quality of life and total community environment, the tone of commerce in the city, property values and the public health, safety and welfare . . .

Admin. Code section 7-701.

11. Under the scheme of the Nuisance Abatement Law, certain violations of the Administrative Code are declared to be public nuisances:

> Public nuisance defined. The following are declared to be public nuisances:
>
> Any building, erection or place, including one- two-family dwellings, used for the purpose of prostitution as defined in section 230.00 of the penal law . . . ;
>
> . . .
>
> Any building, erection or place, including one- or two-family dwellings, wherein there is occurring a criminal nuisance as defined in section 240.45 of the penal law.

Admin. Code section 7-703.

12. Pursuant to sections 7-704 and 7-706, the Corporation Counsel is authorized to bring and maintain an action in the Supreme Court permanently to restrain the above-mentioned

public nuisance as well as the person or persons conducting, maintaining or permitting such public nuisance.

13. During the pendency of an action brought to secure such a permanent injunction, the Court is empowered to grant a preliminary injunction enjoining the public nuisance:

> Pending an action for a permanent injunction as provided for in section 7-706 of this subchapter, the court may grant a preliminary injunction enjoining a public nuisance within the scope of this subchapter and the person or persons conducting, maintaining or permitting the public nuisance from further conducting, maintaining or permitting the public nuisance.

Admin. Code section 7-707(a).

14. The Nuisance Abatement Law also provides for the granting of certain, *ex parte* temporary relief:

> A temporary closing order may be granted pending a hearing for a preliminary injunction where it appears by clear and convincing evidence that a public nuisance within the scope of this subchapter is being conducted, maintained or permitted and that the public health, safety or welfare immediately requires the granting of a temporary closing order. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears by clear and convincing evidence that a public nuisance within the scope of this subchapter is being conducted, maintained or permitted.

Admin. Code section 7-707(a).

15. Furthermore, legal authority to abate defined nuisance activities by means of injunctive relief is also found in the New York Public Health Law. Thus, Public Health Law section 2320(2) states, in pertinent part:

> The building, erection, or place . . . in or upon which any lewdness, assignation, or prostitution is conducted,

> permitted, or carried on, continued, or exists . . . [is] hereby declared to be a nuisance and shall be enjoined and abated . . .

16. To enjoin perpetually such nuisances, the City of New York is authorized to maintain an action in equity in the name of the People of the State of New York in the Supreme Court in the county where the nuisance premises are located. *See* Public Health Law section 2321, subdivisions (1) and (2).

17. During the pendency of such an action to secure a permanent injunction, the court may grant an *ex parte* restraining order and a preliminary injunction:

> [T]he Supreme Court . . . may, without a hearing and without notice, grant an injunction order, restraining the defendants and each of them from continuing such nuisance . . . and in such order fix a time of hearing . . . for an order continuing such injunction order during the pendency of the action.

New York Public Health Law section 2321(4)

III. PUBLIC NUISANCES AT THE SUBJECT PREMISES AS DEFINED BY THE NUISANCE ABATEMENT LAW, AND THE NEW YORK PUBLIC HEALTH LAW.

A. *Violations of the Penal Law*

18. Section 7-703(a) declares that any premises used for the purpose of prostitution as defined by section 230.00 of the New York Penal Law is a public nuisance. "[E]vidence of the common fame and general reputation of the . . . place, . . . of the inmates or occupants thereof; of those resorting thereto, shall [also] be competent evidence to prove the existence of the public nuisance. Section 7-703(a). Furthermore, section 2320 of the New York Public Health Law declares that "[w]hoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness,

assignation, or prostitution is guilty of maintaining a nuisance," and is therefore subject to an injunction to abate the nuisance. The subject premises are being used and occupied as such a nuisance.

19. On January 31, 1998, February 15, 1998 and June 10, 1998, undercover police officers assigned to the Manhattan South Vice Enforcement Squad ("MSVES") participated in investigations of the subject premises to determine whether prostitution was taking place there. On each day, an officer acting in an undercover capacity made an agreement to engage in sexual conduct, and/or sexual intercourse in exchange for a fee. As a result, employees of the establishment were arrested on each occasion for violation of sections 230.00, 230.40, or 240.37 of the New York Penal Law for agreeing to engage in or knowingly profit from acts of prostitution at the subject premises. (*See* Affidavits of Police Officer, Shield No. 3512, Police Detective, Shield No. 2671 and Police Officer, Shield No. 28564, annexed hereto as Exhibits "B", "C" and "D").

20. The sworn statements of the police officers clearly demonstrate that the subject premises are being operated as a commercial establishment wherein the employees engage in sexual conduct with customers for a fee.

21. Moreover, the sexual nature of the services offered at the subject premises also is made clear by the fact that no legitimate goods or services are offered and by the fact that the women employed are engaged in no lawful activities. *See* Exhibits "B", "C" and "D".

B. *Criminal Nuisance*

22. The Nuisance Abatement Law, section 7-703(1) of the Administrative Code, defines a public nuisance to include "any building, erection or place . . . wherein there is occurring a criminal nuisance as defined in section 240.45 of the penal law." Section 240.45(2) of the New York Penal Law defines a criminal nuisance as knowingly conducting or maintaining

any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

23. The facts set forth in the affidavits of the undercover police officers, described above, make it clear that the subject premises are being maintained as an establishment wherein the employees engage in sexual conduct in exchange for a fee in the regular course of business in violation of Articles 230 and 240 of the Penal Law.

24. The defendants' operation of the subject premises in such a manner as to allow people to gather to engage in the unlawful activity of prostitution establishes that the subject premises are a public nuisance. As such, the Nuisance Abatement Law authorizes this court to issue a temporary restraining order and preliminary injunction abating this illegal occupancy forthwith.

IV. IN SUPPORT OF A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

25. Authority for the issuance of a preliminary injunction and temporary restraining order here stems from four sources: the general provisions of Article 63 of the CPLR and the specific provisions of the Administrative Code and the Public Health Law.

26. The Nuisance Abatement Law and the Public Health Law specifically provide for temporary and preliminary injunctive relief ancillary to the permanent injunctive relief. Section 7-707(a) of the Nuisance Abatement Law provides that:

> Pending an action for a permanent injunction as provided for in section 7-706 of this subchapter, the court may grant a preliminary injunction enjoining a public nuisance within the scope of this article and the person or persons conducting, maintaining or permitting the public nuisance from further conducting, maintaining or permitting the public nuisance.

27. *Ex parte* temporary relief is authorized pursuant to section 7-710(a):

> If on a motion for a preliminary injunction pursuant to section 7-707 of this subchapter, the corporation counsel shall show by clear and convincing evidence that a public nuisance within the scope of this subchapter is being conducted, maintained or permitted and that the public health, safety or welfare immediately requires a temporary restraining order, such temporary restraining order may be granted without notice restraining the defendants and all persons from removing or in any manner interfering with the furniture, fixtures and movable property used in conducting, maintaining or permitting the public nuisance and from further conducting, maintaining or permitting the public nuisance, pending order of the court granting or refusing the preliminary injunction and until further order of the court.

28. As stated, *supra*, the New York Public Health Law, at section 2321(4) thereof, also authorizes the issuance of both an *ex parte* restraining order and a preliminary injunction:

> [T]he Supreme Court . . . may, without a hearing and without notice, grant an injunction order, restraining the defendants and each of them from continuing such nuisance . . . and in such order fix a time of hearing . . . for an order continuing such injunction order during the pendency of the action.

29. Therefore, it is clear that this tribunal has the authority to issue preliminary injunctive relief and an *ex parte* temporary restraining order. The issue then becomes what standard must be met as a prerequisite to the granting of an application for such relief.

A. *The standard for granting injunctive relief pendente lite under the Nuisance Abatement Law, and the Public Health Law*

30. When a statutory provision, such as the Nuisance Abatement Law, or the Public Health Law expressly authorizes a municipality to seek injunctive relief to enforce its laws, the municipality need not show any special damages or public injury in support of its application for an injunction. *People ex rel. Bennett v. Lamar*, 277 N.Y. 368, 383 (1938). A *prima facie* showing that the defendant is indeed violating such law is sufficient to entitle the municipality to an injunction *pendente lite*. *Town of Islip v. Clark*, 90 A.D.2d 500, 454 N.Y.S.2d 893 (2d Dept. 1982).

31. This principle has been explicitly recognized in the context of the Nuisance Abatement Law. In *City of New York v. Bilynn Realty Corp.*, 118 A.D.2d 511, 499 N.Y.S.2d 1011 (1st Dept. 1986), the Appellate Division held as follows:

> Special Term improvidently exercised its discretion in denying the City's motions for preliminary injunctions. A municipality has authority to obtain temporary restraining orders strictly enforcing its zoning ordinances. *The three-pronged test for injunctive relief does not apply; no special damage or injury to the public need be alleged; and commission of the prohibited act is sufficient to sustain the injunction.* Plaintiff made a prima facie showing that defendants in each case operated grocery stores which constituted public nuisances in residential districts in violation of the Zoning Resolution and Building Code.

Id. at 513, 499 N.Y.S.2d at 1013 (emphasis added). *Accord*, *City of New York v. Cincotti*, 133 A.D.2d 244, 519 N.Y.S.2d 146 (2d Dept. 1987).

32. There can be no doubt that the defendants are operating or are permitting the operation of a house of prostitution.

Accordingly, plaintiffs have established a *prima facie* case that the defendants are maintaining, or are permitting the maintenance of, public nuisances as defined by sections 7-703(a), and (1) of the Administrative Code and section 2320 of the Public Health Law, that they are conducting, or aiding and abetting the acts of prostitution at the subject premises. Thus, plaintiffs are entitled to a preliminary injunction and temporary restraining order pursuant to sections 7-707 and 7-710 of the Administrative Code, and sections 2321 and 2323 of the Public Health Law.

B. *The standard for granting injunctive relief pendente lite pursuant to CPLR 6301*

33. Plaintiffs also rely upon CPLR 6301 as an independent basis for their application for preliminary injunctive relief. Section 6301(2) provides that a preliminary injunction may be granted in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

34. The courts traditionally have employed a three-pronged test in determining whether a preliminary injunction is indicated, requiring that the moving party demonstrate: (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of a preliminary injunction and (3) a balancing of equities favoring its position. *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761, 771 (1981); *Paddock Constr., Ltd. v. Automated Swimmpools, Inc.*, 130 A.D.2d 894, 515 N.Y.S.2d 662 (3d Dept. 1987). Plaintiffs submit that this standard has also been met.

35. Likelihood of success on the merits is clearly shown by the evidence submitted in support of this motion. Eight employees of FOREVER YOURS have been arrested for prostitution or related offenses, at least one of them on more than

one occasion. Additionally, at least two of the arrests resulted in prostitution convictions. Such establishments are wholly unlawful.

36. The defendants' persistent and intentional illegal use of the subject premises also constitutes irreparable harm to the City of New York, its residents and its visitors. Indeed, in the legislative declaration preceding the Nuisance Abatement Law, the City Council recognized that certain violations of the Penal Law, and Building Code are *per se* harmful to the public. *See* para. 9-11, *supra*. Any violation of the law deemed to be a public nuisance is by definition harmful to the public.

37. Moreover, it cannot be disputed that houses of prostitution, being underground businesses, are often correlated with other illegal activities such as tax evasion, money laundering and the sale of controlled substances. They also foster the spread of communicable diseases and attract the worst element of society, such as organized crime, thereby creating an atmosphere in which it is difficult for legitimate businesses to prosper. *See People v. Behncke*, 141 Misc. 2d 630, 534 N.Y.S.2d 79, 82 (N.Y.Co., Crim. Ct. 1988); *Cherry v. Koch*, 129 Misc. 2d 346, 491 N.Y.S.2d 934, 944 (Sup. Ct., Kings Co. 1985), *aff'd as modified*, 126 A.D.2d 346, 514 N.Y.S.2d 30 (2d Dept. 1989).

38. The equities are also balanced in favor of the plaintiffs. The subject premises are currently being operated as a wholly illegal enterprise. Moreover, it is clear that the defendants *willfully* have been violating the law by operating and maintaining the subject premises as a place of prostitution despite the arrest of eight employees. This willful disregard of the law is evidenced by the defendants' continued operation despite these arrests. The defendants can claim no right to continue operating; no legitimate interest of theirs would be harmed by an injunction, nor can they claim that they have any legitimate expectation that they should be allowed to continue to operate their illegal enterprise. In contrast, the City

of New York, and the public at large, whom it is required to protect, will benefit greatly if the subject premises are rid of the illegal house of prostitution known as FOREVER YOURS.

V. IN SUPPORT OF A CLOSING ORDER PURSUANT TO THE NUISANCE ABATEMENT LAW

39. Plaintiffs also seek an order directing that the subject premises be closed against all use pending the determination of this action and during the pendency of the instant motion for a preliminary injunction.

40. A closing order is sought under the provisions of the Nuisance Abatement Law, which specifies in section 7-709(a) that:

> If, on a motion for a preliminary injunction pursuant to section 7-707 of this subchapter, the corporation counsel shall show by clear and convincing evidence that a public nuisance within the scope of this subchapter is being conducted, maintained or permitted and that the public health, safety or welfare immediately requires a temporary closing order, such temporary order closing such part of the building, erection or place wherein the public nuisance is being conducted, maintained or permitted may be granted without notice, pending order of the court granting or refusing the preliminary injunction and until further order of the court.

41. The above criteria have been met. Not only have plaintiffs shown by clear and convincing evidence that there exist at the subject premises public nuisances within the scope of the Nuisance Abatement Law, but they also have demonstrated that the public health, safety and welfare require immediate abatement of the public nuisances by an order closing the premises against all use pending the determination of this action.

42. The defendants have been undeterred from their course of conduct by law enforcement efforts. They have continued

to operate a house of prostitution at the subject premises despite numerous arrests of the employees.

43. In any event, the defendants can claim no right to their continued operation as a house of prostitution: prostitution is a completely prohibited act under the law. An order closing the subject premises against all use during the pendency of this action is the best assurance that an order of this court granting preliminary injunctive relief would be observed by the defendants. Moreover, plaintiffs request closure of only those portions of the building located at 332 East 22nd Street which are occupied by the offending enterprise, FOREVER YOURS. Such an order would, therefore, be tailored to reach only the defendants' totally illegitimate enterprise; no innocent victims would be included within its scope.

44. This Court has recently granted *ex parte* temporary closing orders in a number of similar cases involving houses of prostitution under the Nuisance Abatement Law. *See, City of New York, et al. v. M & V's Kinder, Inc., et al.*, Sup. Ct., N.Y. Co., Index No, 401565/98; *City of New York, et al. v. Michelle Shenker, et al.*, Sup. Ct., N.Y. Co., Index No. 401486/98; *City of New York, et al. v. Kay Chung, et al.*, Sup. Ct., N.Y. Co., Index No. 401058/98; *City of New York, et al., v. 379 Fifth Avenue Realty Corp., et al.*, Sup. Ct., N.Y. Co., Index No. 400751/98; *City of New York, et al. v. Ginger Lee, et al.*, Sup. Ct., N.Y. Co., Index No. 400445/98; *City of New York, et al. v. Chun Ja Lee, et al.*, Sup. Ct., N.Y. Co., Index No. 400266/98.

45. Accordingly, plaintiffs request that this Court grant, in addition to a preliminary injunction, a closing order to be enforced by the plaintiff City of New York pursuant to sections 7-707, 7-709 and 7-711 of the Administrative Code, directing the closing of the subject premises against all use during the pendency of this action.

46. Pursuant to section 2512 of the Civil Practice Law and Rules and section 2321(6) of the Public Health Law, no undertaking is required to be given by the plaintiffs.

47. No prior application for this relief has been made to any court or judge.

48. To the best of my knowledge, information and belief, the contentions herein are not frivolous as defined in 22 NYCRR section 130-1.1 subsection (c).

WHEREFORE, I respectfully request that plaintiffs' application and motion be granted in all respects.

Dated: New York, New York
June 23, 1998

/s/ Lee S. Siegel

Lee S. Siegel

**Exhibit H to Friedman Declaration -
Order to Show Cause, dated June 25, 1998, for an Order Pursuant to Sections 7-707 and 7-711 of the New York City Administrative Code, Section 2323 of the Public Health Law, and Sections 6301 and 6311 of the Civil Practice Law and Rules**

ORAL ARGUMENT
REQUESTED

EXHIBIT
Plfs 3 ID
5/3/00 lt

At Individual Assignment Part 1 of the Supreme Court of the State of New York, held in and for the County of New York, City and State of New York, at the Courthouse, 60 Centre Street, New York, New York, on the 25 day of June, 1998.

PRESENT
Hon. Beverly S. Cohen

Index No. 402170/98

THE CITY OF NEW YORK, and THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE CITY OF NEW YORK,

Plaintiffs,

– against –

EVADNE BAKER (A/K/A EVADNE ARCHAMBAULT), MARGARITA MARIA ZAVALIA BUNGE, TINA BERGER, THE LAND AND BUILDING KNOWN AS 332 EAST 22nd STREET, BLOCK 927, LOT 37, County, City and State of New York, "JOHN DOE" and "JANE DOE," fictitiously named parties, true names unknown, the parties intended being the owners, lessees, operators or occupants of the establishment doing business as "FOREVER YOURS" located on the first, second and third floors at 332 East 22nd Street, New York, New York, and any person claiming any right, title or interest in the real property which is the subject of this action,

Defendants.

ORDER TO SHOW CAUSE

Upon the annexed affirmation of Lee S. Siegel, dated June 23, 1998; the affidavit of Undercover Police Officer, Shield No. 3512, sworn to on June 22, 1998; the affidavit of Under-

cover Police Detective, Shield No. 2671, sworn to on June 23, 1998; the affidavit of Police Officer, Shield No. 28564, sworn to on June 18, 1998; the summons dated June 23, 1998; and the complaint duly verified by Robin Binder on June 23, 1998 and filed with the Clerk of the Court on June 24, 1998;

LET the defendants and each of them show cause at an Individual Assignment Part 1, Room 543, of this Court, to be held at the Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York on the 30 day of June, 1998, at 2 P.M. of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered pursuant to Sections 7-707, and 7-711 of the New York City Administrative Code, Section 2323 of the Public Health Law, and Sections 6301 and 6311 of the Civil Practice Law and Rules, enjoining the defendants and each of them, their agents, employees, representatives and all persons acting individually or in concert with them during the pendency of this action:

1. From the use or occupancy of the first, second and third floors of the building located at 332 East 22nd Street, New York, New York (the "subject premises"), which are currently being used as a house of prostitution operating under the name FOREVER YOURS on the first, second and third floors for any purpose whatever and directing that the subject premises shall be closed;

2. From conducting, maintaining or operating the subject premises as a house of prostitution, or permitting the same;

3.. From removing or in any other manner interfering with the furniture, fixtures and movable property used in conducting, maintaining or permitting the nuisances complained of herein; and

4. From performing, aiding or abetting acts of prostitution at any location within the State of New York.

FURTHERMORE, oral argument will be heard on the aforementioned date.

MEANWHILE and pending the hearing of this motion, the defendants and each of them, their agents, employees, representatives and all persons acting individually or in concert with them are enjoined pursuant to Sections 7-709, 7-710, and 7-711 of the New York City Administrative Code, and Section 6313 of the Civil Practice Law and Rules:

1. From the use or occupancy of the first, second and third floors of the building located at 332 East 22nd Street, New York, New York ("subject premises"), which are currently being used as a house of prostitution operating under the name FOREVER YOURS, for any purpose whatever and it is hereby ordered that the said premises shall be closed, and that the officers serving this order shall gain access to the subject premises in order: (a) to command all persons present to vacate the subject premises forthwith; (b) to make an inventory of the personal property therein, as required by Administrative Code Section 7-711(c) and New York Public Health Law Section 2323(3); and (c) to lock the subject premises securely once they have been vacated; and

2. From conducting, maintaining or operating the subject premises as a house of prostitution, or permitting the same; and

3. From removing or in any other manner interfering with the furniture, fixtures and movable property used in conducting, maintaining or permitting the nuisances complained of herein; and

4. From performing, aiding or abetting acts of prostitution at any location within the state; and it is further

ORDERED that service of a copy of this order to show cause, together with the papers upon which it is based and the summons and verified complaint, be made upon the defendants personally; or by leaving a copy thereof with a person of suitable age and discretion at the subject premises; or by posting a copy thereof at the subject premises, or by handing

to or leaving a copy with the manager or person in charge of the subject premises, on June 26, 1998 and that this is deemed good and sufficient service on the defendants provided that if service is not made personally, a copy of the papers will be mailed by overnight express mail to each defendant at his or her last known address on June 26, 1998; and it is further

ORDERED that oral argument shall be had on the return date of this motion.

ENTER:

/s/

J.S.C.

Exhibit I to Friedman Declaration -
Consent Agreement, dated June 28, 1998,
as to Apartment #3E at 322 East 22nd Street,
New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EXHIBIT
Plfs 8
ID-5/3/00 lt

Index No. 402170/98

THE CITY OF NEW YORK, and THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK,

Plaintiffs,

– against –

EVADNE BAKER (A/K/A EVADNE ARCHAMBAULT), MARGARITA MARIA ZAVALIA BUNGE, TINA BERGER, THE LAND AND BUILDING KNOWN AS 332 EAST 22nd STREET, BLOCK 927, LOT 37, County, City and State of New York, "JOHN DOE" and "JANE DOE," fictitiously named parties, true names unknown, the parties intended being the owners, lessees, operators or occupants of the establishment doing business as "FOREVER YOURS" located on the first, second and third floors at 332 East 22nd Street, New York, New York, and any person claiming any right, title or interest in the real property which is the subject of this action,

Defendants.

CONSENT AGREEMENT AS TO APARTMENT #3E AT 332 EAST 22nd STREET, NEW YORK, NEW YORK, BLOCK 927, LOT 37.

WHEREAS, on June 24, 1998, the plaintiffs commenced an action to abate a public nuisance in the first, second and third floors of the building at 332 East 22nd Street, Block 927, Lot 37, County, City and State of New York (hereinafter the "subject premises"), and to obtain civil penalties, damages and costs arising therefrom; and

WHEREAS, Justice Beverly S. Cohen granted a temporary restraining order and closing order prohibiting the use and occupancy of the first, second and third floors at the subject premises as a house of prostitution in violation of the Administrative Code of the City of New York and the New York Penal Law on June 25, 1998; and

WHEREAS, defendant Margarita Maria Zavalia Bunge, owner of subject premises, and on behalf of the Land and Building known as 332 East 22nd Street, New York, New York, Devon Walsh, lessee of apartment #3E, on the third floor of the subject premises and plaintiff City of New York desire to execute an agreement pertaining to apartment #3E, on the third floor, of the subject premises;

IT IS HEREBY AGREED, by and among the undersigned, as follows: (1) the restraining and closing Order signed by Justice Beverly S. Cohen on June 25, 1998, which pertains to apartment #3E on the third floor of the subject premises, be vacated only as to apartment #3E; and (2) the restraining and closing Order pertaining to apartment 3W, on the third floor of the subject premises, and all other floors, shall remain in full force and effect as set forth in said order.

Whereas, this agreement shall be effective immediately and shall survive any order entered in the within action.

Dated: New York, New York
June 30, 1998

MICHAEL D. HESS
Corporation Counsel
City of New York
Attorney for Plaintiff
Office of the Mayor
Midtown Enforcement
330 West 42nd Street,
26th Floor
New York, N.Y. 10036

By: /s/ Lee S. Siegel
LEE S. SIEGEL
Of Counsel

By: /s/ Margarita Maria Zavalia Bunge
MARGARITA MARIA ZAVALIA BUNGE

By: /s Devon Walsh 6/30/98
DEVON WALSH

**Exhibit J to Friedman Declaration -
Summons and Verified Complaint,
dated June 23, 1998**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EXHIBIT
Plfs 7
ID-5/3/00 lt

Index No. 402170/98
(Filed in the Office of the Clerk of the Court on June 24, 1998)

THE CITY OF NEW YORK, and THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE CITY OF NEW YORK,

Plaintiffs,

– against –

EVADNE BAKER (A/K/A EVADNE ARCHAMBAULT), MARGARITA MARIA ZAVALIA BUNGE, TINA BERGER, THE LAND AND BUILDING KNOWN AS 332 EAST 22nd STREET, BLOCK 927, LOT 37, County, City and State of New York, "JOHN DOE" and "JANE DOE," fictitiously named parties, true names unknown, the parties intended being the owners, lessees, operators or occupants of the establishment doing business as "FOREVER YOURS" located on the first, second and third floors at 332 East 22nd Street, New York, New York, and any person claiming any right, title or interest in the real property which is the subject of this action,

Defendants.

SUMMONS

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED TO ANSWER the verified complaint in this action and to serve a copy of your answer on the plaintiff CITY OF NEW YORK within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after service is complete if this summons is not personally delivered to you within the

State of New York. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue designated is the residence of the plaintiffs and the county in which the property affected by this action is located. Plaintiffs designate New York County as the place of trial.

Dated: New York, New York
June 23, 1998

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Plaintiffs
c/o Mayor's Office of
Midtown Enforcement
330 West 42nd Street,
26th Floor
New York, NY 10036

/s/ Lee S. Siegel

LEE S. SIEGEL
Of Counsel
Tel.: (212) 643-5510

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No.

THE CITY OF NEW YORK, and THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK,

Plaintiffs,

– against –

EVADNE BAKER (A/K/A EVADNE ARCHAMBAULT), MARGARITA MARIA ZAVALIA BUNGE, TINA BERGER, THE LAND AND BUILDING KNOWN AS 332 EAST 22nd STREET, BLOCK 927, LOT 37, County, City and State of New York, "JOHN DOE" and "JANE DOE," fictitiously named parties, true names unknown, the parties intended being the owners, lessees, operators or occupants of the establishment doing business as "FOREVER YOURS" located on the first, second and third floors at 332 East 22nd Street, New York, New York, and any person claiming any right, title or interest in the real property which is the subject of this action,

Defendants.

VERIFIED COMPLAINT

Plaintiffs THE CITY OF NEW YORK and THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK, by their attorney, MICHAEL D. HESS, Corporation Counsel of the City of New York, for their complaint against defendants, allege as follows, upon information and belief:

1. Plaintiff THE CITY OF NEW YORK is a municipal corporation incorporated under the laws of the State of New York.

2. The plaintiffs bring this action pursuant to and by authority of section 20 of the New York General City Law, section 394 of the New York City Charter, sections 7-704 and 7-706 of the Administrative Code of the City of New York (the "Administrative Code") and sections 2320, 2321 and 2327 of the New York Public Health Law (the "Health Law").

3. The defendant EVADNE BAKER (A/K/A EVADNE ARCHAMBAULT), is an owner of record for the defendant LAND AND BUILDING KNOWN AS 332 EAST 22nd STREET, BLOCK 927, LOT 37, County, City and State of New York, the real property whereupon the activities complained of herein have taken place, and continue to take place, and said defendant has been the owner of record at all times relevant herein.

4. The defendant MARGARITA MARIA ZAVALIA BUNGE, is an owner and managing agent of record for the defendant LAND AND BUILDING KNOWN AS 332 EAST 22nd STREET, BLOCK 927, LOT 37, County, City and State of New York, the real property whereupon the activities complained of herein have taken place, and continue to take place, and said defendant has been the owner of record at all times relevant herein.

5. The defendant TINA BERGER, an individual, is the lessee, operator, occupant or person in charge of the house of prostitution located on the first, second and third floors of 332 East 22nd Street, New York, New York (hereinafter the "subject premises"). Her last known place of business is the subject premises.

6. The defendant LAND AND BUILDING KNOWN AS 332 EAST 22nd STREET, BLOCK 927, LOT 37, County, City and State of New York, is the real property whereupon the activities complained of in this complaint have taken place and continue to take place.

7. The defendants "JOHN DOE" and "JANE DOE" are fictitiously named parties, diligent investigation having failed to disclose their true names, the parties intended being any person or entity that is an owner, lessee, operator or occupant of the subject premises, and any other person claiming any right, title or interest in the real property which is the subject of this action.

FIRST CAUSE OF ACTION

8. Plaintiffs repeat and reallege paragraphs "1" through "7" as if contained herein.

9. Pursuant to section 7-703(a) of the Administrative Code, any building, erection or place that is used for prostitution is deemed a public nuisance.

10. On January 31, 1998, February 15, 1998 and June 10, 1998, individuals employed and doing business at the subject premises, offered to engage in or provided others to engage in sexual conduct and/or sexual intercourse with undercover Police Officer, Shield No. 3512, Police Detective Shield No. 2671 and Police Officer, Shield No. 28564, in return for a fee.

11. As a result of the foregoing, eight employees of the establishment doing business at the subject premises, one of them on more than one occasion, were arrested and charged with violating section 230.00 (prostitution), 230.20 (promoting prostitution) or 230.40 (permitting prostitution) of the New York Penal Law. At least two of the arrests resulted in prostitution convictions.

12. The defendants have owned, leased, used, maintained and conducted the subject premises as a place where sexual conduct is carried out in return for a fee and have permitted, promoted, condoned or acquiesced in the use of the subject premises for said illegal activity.

13. The common fame and general reputation of the subject premises and of the inmates or occupants thereof is that

they use and maintain said premises for the purpose of prostitution.

14. By virtue of the foregoing, there exists a public nuisance at the subject premises.

15. Pursuant to sections 7-706(a) and 7-714 of the Administrative Code, the plaintiffs are entitled to a judgment against the defendants, their agents, assigns, employees and all persons acting individually or in concert with them, permanently enjoining said public nuisance.

SECOND CAUSE OF ACTION

16. Plaintiffs repeat and reallege paragraphs "1" through "15" as if contained herein.

17. Section 2320(1) of the Health Law states that any person who establishes, continues, maintains, uses, owns or leases any building, erection, or place for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.

18. The defendants have maintained, used, or owned the subject premises for the purpose of lewdness, assignation and prostitution.

19. As a result of the forgoing, the defendants are guilty of maintaining a nuisance.

20. Pursuant to sections 2321 and 2327 of the Health Law, the plaintiffs are entitled to an injunction permanently enjoining the defendants from further conducting, maintaining or in any way permitting acts of lewdness, assignation or prostitution to occur at any premises within New York State.

THIRD CAUSE OF ACTION

21. Plaintiffs repeat and reallege paragraphs "1" through "20" as if contained herein

22. Section 2320(2) of the Health Law states that any premises used for the purposes of lewdness, assignation or prostitution shall constitute a public nuisance.

23. The subject premises have been used and are being used for the purposes of lewdness, assignation or prostitution.

24. As a result of the foregoing, there exists a public nuisance at the subject premises.

25. Pursuant to section 2321(1) of the Health Law, the plaintiffs are entitled to an injunction permanently enjoining the defendants, their agents, assigns, employees and all persons acting individually or in concert with them, from conducting, maintaining or in any way permitting the use of the subject premises for the purpose of lewdness, assignation or prostitution.

FOURTH CAUSE OF ACTION

26. Plaintiffs repeat and reallege paragraphs "1" through "25" as if contained herein.

27. Under the Nuisance Abatement Law, section 7-703(1) of the Administrative Code, any building, erection or place wherein there is occurring a criminal nuisance as defined in New York Penal Law section 240.45 is a public nuisance.

28. Penal Law section 240.45(2) defines a criminal nuisance as any premises, place, or resort where persons gather for purposes of engaging in unlawful conduct.

29. The defendants have conducted or maintained the subject premises as a place where persons gather for purposes of engaging in unlawful activities, to wit: acts of prostitution.

30. As a result of the foregoing, there exists a public nuisance at the subject premises.

31. Pursuant to sections 7-706(a) and 7-714 of the Administrative Code, the plaintiffs are entitled to a judgment against the defendants, their agents, assigns, employees and all per-

sons acting individually or in concert with them, permanently restraining such public nuisance.

FIFTH CAUSE OF ACTION

32. Plaintiffs repeat and reallege paragraphs "1" through "31" as if contained herein.

33. The defendants have intentionally conducted, maintained or permitted the public nuisances alleged in the FIRST and FOURTH CAUSES OF ACTION.

34. Pursuant to section 7-706(h) of the Administrative Code, the plaintiffs are entitled to a judgment against each defendant ordering that he/she/it pay a separate penalty of $1000 for each day that such defendant intentionally conducted, maintained or permitted each public nuisance alleged in the FIRST and FOURTH CAUSES OF ACTION.

SIXTH CAUSE OF ACTION

35. Plaintiffs repeat and reallege paragraphs "1" through "34" as if contained herein.

36. The defendants have maintained, and continue to maintain, the subject premises for the purposes of lewdness, assignation and prostitution in violation of the Health Law and the New York Penal Law.

37. The unlawful activities promoted, maintained and allowed by the defendants at the subject premises, as described in this complaint, are detrimental to the health and welfare of the citizens of the State and City of New York and the public at large.

38. The defendants are therefore maintaining the subject premises as a public nuisance as known at common law and in equity jurisprudence.

39. Unless restrained by order of this court, the defendants will continue their illegal activities. In addition, the plaintiffs will be forced to continue expending its limited resources in

continued attempts to abate this harmful nuisance through, for example, additional arrests.

40. The plaintiffs therefore have no adequate remedy at law.

41. As a result of the foregoing, the plaintiffs are entitled to a judgment against the defendants, their agents, assigns, employees and all persons acting, individually or in concert with them, permanently restraining the above-described common law public nuisance.

WHEREFORE, the plaintiffs demand judgment against the defendants as follows:

A. Declaring that the defendants and each of them had knowledge of the existence of the unlawful acts complained of herein, and failed to take reasonable measures to abate such unlawful activity;

B. Declaring that the defendants and each of them have owned, used, leased or operated the subject premises and continue to own, use, lease or operate the subject premises so as to constitute a public nuisance;

C. Directing that the LAND AND BUILDING LOCATED THEREON described herein and made a defendant in this action shall be permanently and perpetually enjoined and restrained as a place in or upon which to conduct, maintain or continue the public nuisances complained of herein by the defendants and by any other person or persons;

D. With respect to the FIRST CAUSE OF ACTION, pursuant to sections 7-706(a) and 7-714 of the Administrative Code, permanently restraining the public nuisance at the subject premises and the defendants, their agents, assigns, employees or representatives, and every person or entity acting individually or in any way permitting the subject premises to be used or occupied as place for prostitution;

E. With respect to the SECOND CAUSE OF ACTION, pursuant to sections 2321 and 2327 of the Health Law, permanently restraining the defendants, their agents, assigns, employees or representatives from further conducting, maintaining or otherwise permitting acts of lewdness, assignation or prostitution to occur at any premises within the State of New York.

F. With respect to the THIRD CAUSE OF ACTION, pursuant to section 2321(1) of the Health Law, permanently restraining the public nuisance at the subject premises and the defendants, their agents, assigns, employees or representatives, and every person or entity acting individually or in any way conducting, maintaining or permitting the subject premises to be used or occupied for the purpose of lewdness, assignation or prostitution.

G. With respect to the FOURTH CAUSE OF ACTION, pursuant to sections 7-706(a) and 7-714 of the Administrative Code, permanently restraining the public nuisance at the subject premises and the defendants, their agents, assigns, employees or representatives, and every person or entity acting individually or in concert with them, from conducting, maintaining or in any way permitting a criminal nuisance as defined by New York Penal Law section 240.45 to occur at the subject premises;

H. With respect to the FIFTH CAUSE OF ACTION, pursuant to section 7-706(h) of the Administrative Code, directing the defendants and each of them to pay to plaintiff THE CITY OF NEW YORK a separate penalty of $1000 for each day that each such defendant intentionally conducted, maintained or permitted each public nuisance complained of in the FIRST and FOURTH CAUSES OF ACTION;

I. With respect to the SIXTH CAUSE OF ACTION, permanently restraining the common law public nuisance which exists at the subject premises, as well as the defendants, their

agents, assigns, employees or representatives and every person or entity acting individually or in concert with them, from conducting or maintaining the subject premises as a common law public nuisance;

J. Pursuant to section 7-714(a) of the Administrative Code, directing the Sheriff of the City of New York to remove from the subject premises all furniture, fixtures, equipment, material, instruments and movable property of whatever kind and nature used in conducting or maintaining the nuisances complained of herein and directing said Sheriff to sell the same in the manner provided for the sale of chattels under execution;

K. Directing that the subject premises be closed against all use for any purpose, as provided by section 7-714(c) of the Administrative Code, and further directing said Sheriff to keep the subject premises closed for one (1) year from date of entry of final judgment herein, unless sooner released as provided by law.

L. Pursuant to section 7-714(g) of the Administrative Code, allowing, in addition to the costs and disbursements allowed by the Civil Practice Law and Rules, the actual costs, expenses and disbursements of plaintiff THE CITY OF NEW YORK in investigating, bringing and maintaining this action, and directing that plaintiff THE CITY OF NEW YORK have execution therefor;

M. Taxing and allowing the costs and disbursements against defendants and directing that plaintiff THE CITY OF NEW YORK have execution therefor;

N. Granting to plaintiffs such other and further relief as the Court may deem just, proper and equitable.

O. To the best of my knowledge, information and belief, the contentions herein are not frivolous as defined in 22 NYCRR section 130-1.1 subsection (c).

Dated: New York, New York
June 23, 1998

MICHAEL D. HESS
Corporation Counsel of
the City of New York
Attorney for Plaintiffs

/s/ Lee S. Siegel

LEE S. SIEGEL
Of Counsel
c/o The Mayor's Office of
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330 West 42nd Street,
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New York, NY 10036
Tel.: (212) 643-5510

VERIFICATION

Robin Binder, an attorney admitted to practice before the courts of the State of New York, hereby affirms the following to be true, under the penalties of perjury pursuant to CPLR 2106:

I have been duly designated as Acting Corporation Counsel of the City of New York and as such, I am an officer of the City of New York in the within action. I have read the foregoing complaint and know the contents thereof; the same are true to my knowledge except as to those matters I believe them to be true.

The reason this verification is not made by the City of New York is that it is a corporation. My belief as to all matters not stated upon my knowledge is based upon information obtained from various departments of the city government and from statements made to me by certain officers or agents of the City of New York.

To the best of my knowledge, information and belief, formed after inquiry reasonable under the circumstances, the contentions herein are not frivolous as defined in 22 NYCRR section 130-1.1 subsection (c).

Dated: New York, New York
June 23, 1998

/s/ Robin Binder

OPPOSITION

BRIEF

(2)

No. 01-1681

Supreme Court, U.S.
FILED
JUN 14 2002
CLERK

In the

Supreme Court of the United States

THE CITY OF NEW YORK and LEE S. SIEGEL,

Petitioners,

vs.

DEVON WALSH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 13, 2002

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REASONS FOR DENYING THE WRIT

In a brief unreported summary order, the Second Circuit held that Petitioner Lee S. Siegel was not entitled to either absolute or qualified immunity as a matter of law for his activities in submitting a sworn affidavit supporting a closing order on Respondent's apartment. (A1-7). Based on that order, Respondent's apartment was broken into and searched and then a closing order was attached to the door with the legend "closed for prostitution," prohibiting her from entering her own home. Given the unusual factual setting in which the case arose and given the clear precedents in support of the Second Circuit's decision, the writ should not be granted.

I. PETITIONER SIEGEL IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR PREPARING AND SWEARING TO AN AFFIDAVIT SUPPORTING THE CLOSING ORDER OF RESPONDENT'S APARTMENT.

Petitioner Siegel is an attorney working for the Mayor's Office of Downtown Enforcement for the City of New York. Among the functions of that office are securing closing orders for houses of prostitution within the midtown district of Manhattan. As the Second Circuit noted, Mr. Siegel interviewed various policemen who had been solicited for sex in the apartment building where Respondent Walsh resided. It was apparent that the first and second floors and apartment 3W were used as places of prostitution. One officer (Jagdeshwar Jaskaran) was propositioned for sex in 3W. He saw a closed door inside 3W which he "believe[d]" led directly to 3E. He testified during a deposition that he "assumed" and "had a feeling" that the two apartments were connected. (A-145) and therefore the other apartment (3E) was also tainted.

Based on the officer's "belief" "assumption" and "feeling," Petitioner Siegel prepared two affidavits in support of a court closing order: one for officer Jaskaran and one for himself. Both affidavits stated that "the first, second *and third floors*" of the building are used for purposes of prostitution. (A-51, 162)(emphasis added). Mr. Siegel's affirmation in support also stated that the closing order sought was "tailored to reach only the defendants' totally illegitimate enterprises; *no innocent victims would be included within its scope*." (A-174)(emphasis added).

Based on these statements, the Second Circuit properly held that Mr. Siegel was not entitled to absolute prosecutorial immunity as a matter of law. Following this Court's decision in *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court found that Mr. Siegel was not entitled to absolute immunity.

> Nor was Siegel entitled to summary judgment based on the doctrine of absolute prosecutorial immunity. The Supreme Court made clear in *Kalina v. Fletcher*, 522 U.S. 118, 130-31 . . . (1997) that when a prosecuting attorney undertakes to act not only in that role but also in the further role of a witness, her furnishing of false evidence is not protected by the shield of absolute immunity. (A-7).

This holding was clearly correct and does not require review by this Court. Petitioner argues that *Kalina* does not control since in that case the "prosecutor's" affidavit was the sole basis for the search warrant at issue in that case, that is, she was "the sole guarantor of the truth." (Cert. pet at. 9). Petitioner argues here that he acted only to present "the affidavits of three eyewitness

accounts of the illegal activity." (*Id.*) However, nowhere in *Kalina* did this Court use the word "sole" or focus on the fact that no other affidavits were represented. Rather, this Court emphasized that:

> Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required "Oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness. 522 U.S. at 130-31.

Indeed the prosecutor in *Kalina* summarized the relevant facts just as Mr. Siegel did here: "she *summarized* the evidence supporting the charge and swore to the truth of the alleged facts '[u]nder penalty of perjury.'" *Id.* at 118.

Furthermore, Mr. Siegel did more than summarize the officer's affidavits. He swore to the "tailoring" of the closing order to protect the rights of innocent parties, indicating that he personally was aware of efforts to protect the privacy rights of third parties. Under *Kalina*, Mr. Siegel is not entitled to absolute immunity.

II. FACTUAL ISSUES ARE IN DISPUTE RELATING TO PETITIONER'S ACTIONS AND SUMMARY JUDGMENT CANNOT BE AWARDED ON THE GROUNDS OF QUALIFIED IMMUNITY

The Second Circuit also properly found that Petitioner was not entitled to summary judgment on the grounds of qualified immunity since there were factual disputes

relating to the reasonableness of Mr. Siegal's actions. Mr. Siegel testified that Officer Jaskaran had told him that there was an "opening" between the two apartments, which justified including 3E in the closing order. (A-105). But Officer Jaskaran testified in his deposition that all he saw was a closed door which he "believed," "assumed" "had a "feeling" led to the second apartment. (A-145). If a jury believed Officer Jaskaran's version, clearly Mr. Siegel had no basis for preparing the affidavits at issue identifying 3E as a target of the order. The Second Circuit explained, "As a matter of law, Jaskaran's belief could not satisfy the 'clear and convincing' requirement [for a closing order]; Siegel had no reason to believe the door did not simply lead into a closet, a bathroom, or another room in # 3W." (A-6).

This Court has emphasized that hunches, feelings, beliefs, assumptions are not a basis for searches or seizures or even temporary stops of indiviuals and that principle has been clearly established for decades. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (stating that reasonable suspicion, which is "less demanding than probable cause," requires an officer to articulate more than an "unparticularized suspicion or 'hunch,'" citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968))

Thus there are disputed facts as to exactly what Officer Jaskaran told Mr. Siegel. If the officer's version is accepted, there is no basis for finding probable cause or even arguable probable cause. This Court has emphasized if a government actor's claim for qualified immunity depends upon disputed historical or evidentiary facts, qualified immunity cannot be granted at the summary judgment stage. See *Johnson v. Jones*, 513 U.S. 304, 314-15 (1995)(summary judgment not possible on qualified immunity grounds where evidence sufficient to show

triable issues of historical fact as to actions in question; "evidence sufficiency" issue not basis for qualified immunity finding on summary judgment).

That is precisely the situation now before the Court. Based on the version of events presented by Respondent, based on the testimony of officer Jaskaran, there was no basis for the closing order. As the Second Circuit noted, "An attorney who has secured an order of seizure by the submission of his affidavit that inaccurately presents the information known to him cannot be entitled to judgment in his favor based on a 'good-faith' immunity," (A-6). There is no basis for this Court to review this unusual factually-centered decision.

CONCLUSION

For the reasons stated above, the writ of certiorari should be denied.

Dated: June 13, 2002

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